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In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1388~~ 154

LUCILLE MILLER,
PETITIONER,

v.

STATE OF CALIFORNIA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE ~~SUPREME COURT OF CALIFORNIA~~ COURT OF APPEAL OF CALIF. 4TH APPELLATE DIST.

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LUCILLE MILLER,
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STATE OF CALIFORNIA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioner prays that a writ of certiorari issue to review judgment of the Supreme Court of California, entered in the above entitled case on December 14, 1966.

Citations to Opinions Below

The judgment of the Supreme Court of California, denying hearing, is not reported and appears as a minute order in the Court's records (Minute Order in case No. 2512).

The opinion of the District Court of Appeal is reported at 53 Cal. Rptr. 720, (also 245 A.C.A. 111) and is printed

as Appendix A. A modification of that opinion is printed as Appendix B.

Jurisdiction

The California District Court of Appeal, Fourth Circuit, Division 1, affirmed petitioner's first degree murder conviction on September 22, 1966 (rehearing denied on October 20, 1966). The California Supreme Court declined review on December 14, 1966, thereby affirming the judgment of conviction. Mr. Justice Douglas granted an extension of time, until May 13, 1967, within which to file the petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Questions I - III in this petition were raised at the trial by an objection made outside the hearing of the jury in an on-the-record proceeding (See trial transcript pp. 1007-15); they were raised in both appeals and considered in detail by the District Court of Appeals, see, 53 Cal. Rptr. at 738-740. This is discussed more fully at pages 5-13 *infra*.

Question IV was raised on both appeals (which was the earliest possible time it could have been raised) and considered in detail by the District Court of Appeals, see 53 Cal. Rptr. at 736-37.

Question V was raised at trial by an objection in open court (see trial transcript pp. 208-216); it was raised in both appeals and considered in detail by the District Court of Appeals, see, Cal. Rptr. at 737-38.

Questions Presented

I. Whether the introduction of admissions made to an undercover agent planted in petitioner's jail cell constituted a violation of petitioner's constitutional rights to counsel and against self-incrimination.

II. Whether inculpatory admissions, obtained under circumstances like those here involved, can ever constitute harmless error.

III. Whether the California Courts erred in concluding that the admissions introduced in this case were not prejudicial.

IV. Whether it is unconstitutional for a prosecutor, who does not intend to seek the death penalty from the jury, to disqualify for cause those jurors who have conscientious scruples against imposing the death penalty.

V. Whether the introduction of evidence obtained from the warrantless search of a car, not incident to arrest, but for fire investigation purposes, constituted a violation of petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution.

Constitutional Provisions

The constitutional provisions involved are the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. They are printed in 1 U.S.C. XLVI.

Statement

a. *The Discovery of The Alleged Crime*

About 1:45 a.m. on Oct. 8, 1964, petitioner, Mrs. Lucille Miller, arrived at the home of Mrs. Maurice Swenson in Alta Loma, California, saying that her husband Dr. Gordon Miller was trapped inside a burning car. Mrs. Swenson called the sheriff's office and, at Mrs. Miller's request, also called Harold J. Lance, a close friend of the Millers and their family attorney. (R. 63-70)[1] When Lance and a fire company arrived at the Swenson home, Mrs. Miller led them

[1] R. refers to the official transcript of the trial record.

back to the burning Volkswagen. After some time the fire was extinguished, but Dr. Miller was dead. (R. 86-90) Lance then drove petitioner home, but they returned to the scene at about 3:00 a.m., (R. 128-31) where she told the police officer present that she had been driving with her husband when she lost control of the car which ran up on the side of the road. She said that she must have been dazed and that the next thing she knew, flames were springing up behind her. In panic, she jumped out of the car and ran around to the other side to pull her husband out, but his door was locked. She tried, but failed, to open the door, and after realizing that she could do nothing more, she went to the Swenson home to get help. (R. 365-70)

b. *The Search of The Car*

At 8:00 a.m. that morning, the law enforcement officers conducted a warrantless search of the death car and found an empty can of gasoline on the floor in front of the back seat. (R. 470, 487) At 9:00 a.m. the police, still without a warrant, hauled the car to a police garage several miles away where other objects were removed from it. (R. 408, 729) Further examination of the car was made at various times thereafter. Evidence obtained from these searches was introduced, over objection at petitioner's trial. (R. 208-16) Although there was ample opportunity to obtain a search warrant, none was obtained. Nor did petitioner consent to these searches of the car. (R. 207-213)

c. *The Arrest, Booking, and Initial Interrogation*

At 1:50 p.m. on October 9, three deputy sheriffs entered Mrs. Miller's home and placed her under arrest for murder. (R. 60, 1017) She was taken to the San Bernardino County jail where she was met by her attorney and "booked" for

murder. (R. 1018) At 9 a.m. she was taken from her cell and questioned for several hours.[2]

d. *The Undercover Agent in Petitioner's Jail Cell*

At about 11 p.m. on October 9, Peggy Fisk, an undercover agent in the employ of the Sheriff's office, was falsely "hooked" on a narcotics violation and placed in petitioner's cell. (R. 1103) Shortly thereafter, the two other prisoners who had been sharing the cell with petitioner were removed so that Miss Fisk could be alone with petitioner in the cell. (R. 1107-08) Miss Fisk remained alone in the cell with petitioner for 7 days, until Oct. 15. During that entire period, petitioner had a number of retained lawyers who remained on duty outside her cell 24 hours a day in order to assure that the authorities would respect her privilege against self-incrimination. (R. 2319). Petitioner, of course, did not have counsel inside the cell. Nor did she think she needed one there, for Miss Fisk never told petitioner that she was a police agent rather than a real prisoner, or that she had a right to remain silent and have an attorney present at all their "discussions". On October 13, during the period that Miss Fisk was in the cell, petitioner was brought before Superior Court Judge John Kerrigan and formally charged with first degree murder.[3] Miss Fisk remained in the cell and continued to obtain incriminating information even after petitioner had been formally charged.

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[2] A tape of this interrogation was introduced at petitioner's trial. During this interrogation, petitioner repeated the story she told the police the previous night. She admitted that she had been involved in an affair with a Mr. Hayton but claimed that the affair had ended in August. (R. 1017-25, 1079-90)

[3] The judge issued an order prohibiting officials from questioning petitioner unless her attorney was present. He also ordered petitioner's attorneys to stop sitting outside the cell. The prosecutor violated the order by keeping Miss Fisk in the cell with petitioner until October 15.

e. *The Trial*

Petitioner's second trial commenced on January 11, 1965.[4] On voir dire, all prospective jurors were asked whether they were opposed to capital punishment. Of the 119 jurors in the venire, 59 admitted that they were opposed to capital punishment and each of them was eliminated for cause. (R. 1a-672a) At the time of the voir dire, the judge and prosecutor knew that petitioner was pregnant. (Transcript of proceedings on Dec. 21, 1964, pp. 3-4).

The state's theory at the trial was that the fire that killed Dr. Miller was of incendiary, rather than accidental, origin; (R. 244-62) that petitioner was infatuated with Mr. Hayton and hated her husband; (R. 4-12, 1258, 2015-19) and that petitioner therefore started the fire to be rid of her husband so that she could marry Hayton and collect the $100,000 insurance of which she was the beneficiary in the event of her husband's accidental death. The defense theory was that the fire was of accidental, rather than incendiary, origin; (R. 1567-78, 1805-13) that although petitioner had been infatuated with Mr. Hayton, the affair was over several months before Dr. Miller's death; (R. 874, 935, 1783-88) that petitioner was reconciled with her husband at the time of his death; and that petitioner would not be motivated to kill a successful $30,000 a year dentist in order to collect a mere $100,000 in insurance.

As these conflicting theories were unfolding, Peggy Fisk was called as a government witness. Petitioner's counsel objected to permitting Miss Fisk to testify, on the ground, among others, that such testimony would violate "the rule in *Messiah* [sic] *versus the United States.*" (See pp. 7, *infra.*) Peggy Fisk testified that petitioner had admitted

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[4] Her first trial ended after several days of jury selection in a mistrial declared by the judge because of highly prejudicial publicity appearing in the local press. (R. 3)

to her that "she did not love her husband;" that "she always loved Mr. Hayton and still did"; and that she was planning to go to Europe with the $100,000 in insurance. (R. 1100-01) The prosecutor relied heavily on Miss Fisk's testimony during the course of the trial and in his closing remarks to the jury. (R. 1258-59, 2019, 2061-62, 2318-20)

The jury deliberated for more than three days before they returned a verdict of guilty of murder in the first degree. (R. 2376, 2441). The prosecutor then announced his intention to waive a jury determination of the penalty and not to ask for the death sentence; the judge sentenced petitioner to life imprisonment. (R. 2447-50)

This Court's Power to Review: Petitioner's conviction rests on a violation of her Federal Constitutional rights and not on any adequate state ground.

The District Court of Appeal asserted that counsel for defendant below did not object to the testimony of Peggy Fisk, the undercover agent, at any "time during Peggy's testimony . . . ." 53 Cal. Rptr. at 740. It added, however, that if it thought that Peggy Fisk's testimony had been prejudicial "we would have no hesitancy in ordering a reversal in spite of the fact of defendant's failure to object to Peggy's testimony." *Ibid.* Petitioner will demonstrate that this does not constitute an adequate state ground because (a) Petitioner's counsel did specifically object to Miss Fisk's testimony on the ground that its introduction into evidence "violates . . . the rule in *Messiah* [sic] *versus the United States* (R. 1009)". (b) Even if his clear objection is not regarded as sufficient under local California practice, such practice does not constitute an adequate state ground under *Henry* v. *Mississippi*, 379 U.S. 443 (1965); and (c) The California Courts do not themselves regard what occurred below as an adequate state ground.

A. When Peggy Fisk, the sheriff's undercover agent, was called to the stand as a witness for the prosecution, Petitioner's counsel, Mr. Foley, objected to "any evidence from this witness as this particular time." The ground stated in support of the objection at that time was non-federal. (R. 1007) At the suggestion of the court, proceedings were then continued outside the hearing of the jury in the Judge's Chambers. The proceedings remained on the record and the following persons were present: The Judge; the Deputy District Attorney; the defense attorney; the defendant; and the Court Reporter. (R. 1008) At this time the defense attorney added the following federal objection: "I am going to represent to the court also that any testimony of the witness concerning any statement made by my client would be in violation of the rule in the *Dorado* case. She was an undercover agent, and never informed my client of her capacity. Never advised my client of [her] right to remain silent. So any testimony of this witness concerning statements made by my client not only violates the rule in the *Dorado* case, but . . . also the rule in *Messiah* [sic] *versus the United States.*" (R. 1009) The deputy district attorney replied at length to defense counsel's objection. He admitted that Peggy was an undercover agent (R. 1009) but asserted that because "no attempt was made to force [petitioner] to talk" (R. 1011), any "statements which [petitioner] made" (R. 1012) could be introduced into evidence. Defense counsel asserted, in response, that under the cases he had cited it was "one of our rights as an attorney to demand to be present . . . and this woman did not advise my client that she was a law enforcement agent. It was by trickery and device that she tried to obtain statements from my client." (R. 1012) The court, responding to Mr. Foley's non-federal objection, suggested that the state withdraw Peggy until the following day. In response to the *Dorado-Massiah* objection

the court ruled, however, that "we would have to have her sworn and at least testify to the preliminary questions anyway, and have an objection made at the proper time." (R. 1015) Petitioner's attorney, Mr. Foley, disputed the judge's requirement that he must object in the presence of the jury after the preliminary questions, asserting: "You know that isn't right, your Honor." The judge then concluded the hearing by saying: "I don't see how it could be done in the absence of the jury." When Peggy was called to the stand the following day (R. 1098), defense counsel did not renew his objections to the admission of Peggy's testimony in the presence of the jury, and he cross-examined her.

B. This Court has held that "where the judgment of the state court rests on 2 grounds, one involving a federal question and the other not . . . and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." *Lynch* v. *N. Y.*, 293 U.S. 52, 54-55 (1934). But whether or not the state ground is "sufficient" is a federal question which must be decided by this Court.[5] In *Henry* v. *Mississippi*, 379 U.S. 443 (1965), the Court had occasion to consider the sufficiency of an asserted state ground in a factual context similar to the one in this case. In *Henry*, "petitioner's federal claim derive[d] from the admission of a police officer's testimony" which was allegedly the fruit of an unlawful search. 379 U.S. at 444 Henry's lawyers made no objection to the evidence either before, or at the time of its introduction; they did move "for a directed verdict at the close of the

[5] See *e.g. NAACP* v. *Ala. ex rel. Patterson*, 357 U.S. 449 (1958); *Abie State Bank* v. *Bryan*, 282 U.S. 765 (1931); *Henry* v. *Mississippi*, 379 U.S. 443 (1965). "If the Constitution and laws of the United States are to be enforced this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923).

State's case, assigning as one ground the use of illegally obtained evidence . . . ." *Id* at 445. The Mississippi Supreme Court sustained the conviction on the ground that Henry's lawyer had failed to make "timely objection to the evidence."[6] *Id.* at 446.

Mr. Justice Brennan, writing for the Court, set out the considerations governing cases such as *Henry* and the one at the bar, where the allegedly adequate "state ground is purely procedural." *Id.* at 447. The Court cited a series of cases which

> "settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Id.* at 447.

It then discussed the interests served by the contemporaneous objection rule, the rule allegedly violated both in *Henry* and here.

> "By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and new trial avoided." *Id.* at 448.

The Court then went on to consider whether the objection made in *Henry* adequately served the legitimate interests of the State.

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[6] The Mississippi Supreme Court also held that "petitioner's *cross-examination* of the State's witness "cured" the original error and estopped petitioner to complain of the tainted evidence." 379 U.S. at 445. This Court did not in any way intimate approval of this "cure" theory.

"[O]n the record before us it appears that this purpose of the contemporaneous-objection rule may have been substantially served by petitioner's motion at the close of the State's evidence asking for a directed verdict because of the erroneous admission of the officer's testimony. For at this stage the trial judge could have called for elaboration of the search and seizure argument and, if persuaded, could have stricken the tainted testimony or have taken other appropriate corrective action. . . . In these circumstances, the delay until the close of the State's case in presenting the objection cannot be said to have frustrated the State's interest in avoiding delay and waste of time in the disposition of the case. . . . [G]iving effect to the contemporaneous-objection rule for its own sake 'would be to force resort to an arid ritual of meaningless form'."[7] *Id.* at 448-9.

If the objection in *Henry*, made as it was after the challenged evidence had already been introduced, "cannot be said to have frustrated the State's interest," then certainly the objection here, made *before* the challenged evidence was introduced, did not thwart any legitimate state interest. To give effect to the California's contemporary-objection rule in the context of this case, where the judge was fully apprised of the grounds for the objection and where the prosecutor fully presented his arguments against the objection, would surely be "to force resort to an arid ritual of meaningless form."

Moreover, the California requirement that counsel must

[7] In *Henry*, the Court remanded the case to the Mississippi Supreme Court so that the State would have an opportunity to establish, by "evidence extrinsic to the record," that trial counsel waived objection for strategic reasons. See 379 U.S. at 451. No such reasons are suggested by the record here. See Footnote 8 *infra*.

renew his objection in the presence of the jury after the prosecution's preliminary questions had been asked and answered, forces defendants into an unconstitutional choice between foregoing their federal constitutional rights or making an objection which, if sustained, would inevitably leave in the jurors' minds the indelible impression that the suppressed evidence must have been damning indeed. The choice required of defense counsel by the California rule is particularly unfair in a case like the one at bar, where the unconstitutional testimony, though damaging to the defendant, is far less damaging than what the jury might imagine it to be. In this case, defense counsel would have had to make his objection in the presence of the jury after Peggy Fisk had stated that she had been petitioner's cellmate, that petitioner had made statements to her, and that she had never advised petitioner of her constitutional rights. A sustained objection at that point could not fail to leave the jury with the erroneous impression that petitioner had confessed to the crime. No legitimate state interest is served by requiring, in the context of a case like this, that an objection be renewed in the presence of the jury after preliminary questioning. See *Jackson* v. *Denno*, 378 U.S. 368, 378-88 (1964).[8]

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[8] In light of the unconstitutional choice to which petitioner's counsel was put, it cannot be argued that his decision not to object in the presence of the jury was a "strategic, tactical" or other decision "that can fairly be described as the deliberate by-passing of state procedures." *Fay* v. *Noia*, 372 U.S. 391, 439 (1963). There is nothing in the record to support the view that he preferred to have Peggy Fisk's testimony admitted rather than excluded. Compare *Henry* v. *Mississippi*, *supra*, at p. 451; and see note 7 *supra*. Indeed, if this were the case it would be extremely difficult to explain why he voiced his objection before her testimony. The most that can be said is that he may have preferred to have Peggy's testimony admitted rather than object in the presence of the jury after the preliminary questions. Indeed this is precisely how petitioner's trial counsel explained, in his motion for a new trial, why he had not renewed his objection. See F. vol. II, 266.

C. There is another, and conclusive, reason why petitioner's alleged failure to object to Peggy Fisk's testimony does not preclude this Court from reviewing petitioner's conviction. It is well established that even if an asserted state ground is adequate—which petitioner denies is the case here—the Supreme Court may still assume jurisdiction if the state "allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion . . . ." *Williams* v. *Georgia*, 349 U.S. 375, 383 (1955); *Abie State Bank* v. *Bryan*, 282 U.S. 765, 772-3 (1931); *NAACP* v. *Ala. ex. rel Flowers*, 377 U.S. 288 (1964). And California decisions clearly establish that there is such discretion in the appellate courts of that state. See e.g., *People* v. *Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 (196); *People* v. *Mitchell*, 48 Cal. Rptr. 586 (1966). Indeed, the District Court of Appeals did exercise discretion in this very case. It did not regard itself as precluded from reviewing the admissibility of Peggy Fisk's testimony. It clearly said that it "would have no hesitancy in ordering a reversal in spite of the fact of defendant's failure to object", if it regarded the testimony as prejudicial. Whether Peggy Fisk's unconstitutional testimony was prejudicial is an issue which petitioner asks this Court to decide. This issue was decided —erroneously in petitioner's view—by the California District Court of Appeals despite its assertion that timely objections had not been raised. Accordingly, it may also be considered by this Court on *certiorari*.

Reasons for Granting the Writ

I. The Court Should Grant Certiorari To Decide Whether Introduction of Admissions Made to an Undercover Agent Planted in Petitioner's Jail Cell Constituted a Violation of Petitioner's Constitutional Rights to Counsel and Against Self-Incrimination.

There can be no dispute about the unconstitutionality of the manner in which Peggy Fisk obtained petitioner's admissions. The California District Court of Appeals expressed no doubt about that in describing the events surrounding the admissions:

> It is almost incredible that in these days of enlightened treatment by prosecution authorities of persons charged with crime, the Peggy Fisk incident could have occurred. Peggy was an undercover agent, working in narcotics and employed by the sheriff. She was falsely booked in the jail as a narcotics violator and placed in a cell with defendant in the obvious hope that defendant would make some statement helpful to the prosecution. 53 Cal. Rptr. at 738.

The lower court also observed that:

> Peggy told defendant that she had talked to the sheriff and that they had discussed Peggy's getting "a floater out of the State." Peggy then said to defendant, "I put all my trust in Mr. Bland [the sheriff] and maybe it would do some good for you if you tried the same." Peggy indicated that she had mistrusted her own attorney and indicated that perhaps defendant should mistrust hers. *Id.* at 739.

The Court then concluded that:

> The trick attempted by the authorities in which they apparently hoped to obtain incriminating statements from defendant and to get her to throw herself on the alleged mercy of the sheriff and to suspect her own attorney was completely indefensible, . . . We have in mind *Massiah* v. *United States,* 377 U.S. 201 . . . and *Escobedo* v. *State of Illinois,* 378 U.S. 478 . . ." 53 Cal. Rptr. at 740.

It would be difficult to imagine a more blatant violation of petitioner's federal constitutional right to counsel and against self-incrimination under *Massiah* and *Escobedo, supra.* And it is clear that the California District Court of Appeals would have reversed petitioner's conviction under those decisions if it had not entertained the erroneous beliefs that petitioner's counsel had not properly objected to Peggy Fisk's testimony (see *supra* pp. 5-13) and that petitioner was not sufficiently prejudiced by the testimony (see *infra* pp. 21-26).

In *Massiah* v. *United States,* 337 U.S. 201 (1964) this Court held the "petitioner was denied the basic protection of the guarantee [of the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206. In *Massiah,* as here, petitioner did not make a specific request to consult with his previously retained counsel, since he was unaware that he was being questioned by someone working for the government. This did not preclude reversal of *Massiah's* conviction, because as the Court noted (quoting from Judge Hays dissent in the Court of Appeals, 307 F.2d at 72-3):

> "if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent." 377 U.S. at 206.

Accordingly, there are only two differences between the *Massiah* case and the one at bar: 1) *Massiah* was a federal and this is a state case; and 2) The "indirect and surreptitious interrogation" in *Massiah* occurred after the defendant had been indicted and released on bail; while the "indirect and surreptitious interrogation" here occurred after petitioner was arrested and booked for murder and while she was in jail awaiting indictment. Petitioner will show, however, that this Court has held, in two cases *decided before petitioner's trial began,* that these differences are without significance.

In *McLeod* v. *Ohio,* 378 U.S. 582, decided on June 22, 1964, this Court held the rule announced in *Massiah* applicable to the states.[9] Consequently, the first of the above mentioned differences between *Massiah* and this case is without significance. In *Escobedo* v. *Illinois,* 378 U.S. 478, decided on June 22, 1964, the interrogation was conducted after defendant was arrested but before he had been indicted. The Court extended the *Massiah* rule to such interrogations, observing that:

> "It would exalt form over substance to make the right to counsel, under these circumstances, depend

[9] In that decision, the Court remanded to the Supreme Court of Ohio for reconsideration in light of *Massiah* v. *United States*, 377 U.S. 201, thereby deciding that the *Massiah* rule applied to the states, but affording the Ohio court an opportunity to decide whether the facts in that case were governed by *Massiah*. When the Ohio Supreme Court affirmed the conviction, the Supreme Court reversed, citing *Massiah*, 381 U.S. 356 (1965).

on whether at the time of the interrogation the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." 378 U.S. at 486.

Petitioner's trial began on January 11, 1965. At that time, therefore, this Court had announced the following rules:

1) Indirect and surreptitious questioning of a federal defendant by a government agent after he had been indicted and retained counsel violated his rights under the Sixth Amendment. *Massiah* v. *United States, supra.*

2) When the interrogation was indirect and surreptitious, no request to consult counsel need be made. *Massiah* v. *United States, supra.*

3) These rules apply to the states through the Fourteenth Amendment. *McLeod* v. *Ohio, supra.*

4) These rights do not depend, in cases where the defendant has been arrested and booked, on whether "the authorities had secured a formal indictment." *Escobedo* v. *Illinois.*[10]

These rules—and the decisions which embodied them—squarely cover the admissions made to Peggy Fisk in this case. The nature of the questioning was identical with that in *Massiah* (surreptitious questioning by a government

[10] The Court, in *Massiah* and *Escobedo* had also applied the rules to admissions as well as confessions; indeed in both of those cases, the incriminating statements were admissions rather than confessions. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966) the Court extended these rules to exculpatory as well as inculpatory admissions, 384 U.S. at 444. Petitioner does not, however, place any reliance on *Miranda*, since the challenged statement here was the sort of inculpatory admission clearly covered by *Massiah* and *Escobedo*.

agent), and the stage in the process was identical with that in *Escobedo* (defendant had been arrested, booked, and had retained counsel). Consequently, those cases (combined with *McLeod* which applies *Massiah* to the states) require the conclusion that the manner in which Peggy Fisk obtained petitioner's admissions constituted a violation of petitioner's federal constitutional rights.[11]

II. This Court Should Grant Certiorari to Determine Whether Inculpatory Admissions, Obtained Under Circumstances Like Those Here Involved, Can Ever Constitute Harmless Error.

As this Court recently observed in *Chapman* v. *California*, 35 L.W. 4197 (1967) — U.S. — "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 35 L.W. at 4199. As an example, the court cited "*Payne* v. *Arkansas*, 356 U.S. 560

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[11] *Miranda* v. *Arizona*, 384 U.S. 436 (1966), decided after petitioner's trial, added nothing to the cases decided before her trial which is relevant to the circumstances of this case; consequently, the rule announced by this Court in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) does not bar reversal of petitioner's conviction. *Miranda* added the following major elements to *Massiah* and *Escobedo*:

1) In *Escobedo* the defendant had requested an opportunity to consult with counsel. In *Miranda*, the Court held that "[a]n individual need not make a pre-interrogation request for a lawyer." 384 U.S. at 470. Instead, he "must be clearly informed that he has the right to consult with a lawyer . . ." Id. at 471.

But this did not change the law in cases like the one at bar, since it already had been held in *Massiah*, that a defendant who, like petitioner, was the victim of "indirect and surreptitious interrogation" need not have made a request for a lawyer, "because he did not even know that he was under interrogation by a government agent." *Massiah* v. *United States*, *supra* at 206.

2) In *Escobedo*, the defendant had retained a lawyer. In *Miranda*, the Court held that if a defendant is indigent, he had

(coerced confession)." This Court has long regarded the introduction into evidence of involuntary confessions as so inherently prejudicial as to require the reversal of convictions regardless of the other evidence of guilt. *Malinski* v. *New York*, 324 U.S. 401, 404 (1945); *Lynum* v. *Illinois*, 372 U.S. 528, 537 (1963); *Spano* v. *New York*, 360 U.S. 315, 324 (1959); *Haynes* v. *Washington*, 373 U.S. 503, 518-19 (1963). Nor has the Court distinguished between confessions and inculpatory admissions. See *Massiah* v. *United States, supra; Escobedo* v. *Illinois, supra* (both of which involved admissions). This recognition of the peculiarly prejudicial impact of confessions and admissions reflect the common sense truth that:

> "The introduction into evidence of a defendant's out-of-court statement implicating himself in the crime charged is a significant step in the prosecution's attempt to obtain a conviction. The impact of such a statement stems not only from its contents, but also

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the right to have a lawyer appointed to represent him. 384 U.S. at 472-3.

But petitioner here was not indigent. She had already retained counsel. Accordingly, *Miranda* did not change the law as it applied to her. All the law she needed to establish the unconstitutionality of the challenged practice was announced prior to her trial. Accordingly, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), requires that this law be applied to her case; and an application of *Massiah* and *Escobedo* to this case requires the conclusion that petitioner's constitutional rights were violated by the introduction of evidence secured in the manner in which Peggy Fisk's testimony was obtained.

Even if this Court were to disagree with petitioner's contention that *Massiah* and *Escobedo* establish the unconstitutionality of Peggy Fisk's testimony, *Johnson* v. *New Jersey* would still be inapplicable. If *Massiah* and *Escobedo* do not establish the unconstitutionality of Peggy Fisk's testimony, then the facts of this case present a new and undecided issue requiring resolution by this Court. In that event, the Court should grant the petitioner a writ of certiorari, announce its resolution of the issue, and apply that resolution to petitioner in this case. In no event, therefore, can it be said that *Johnson* v. *New Jersey* bars relief to petitioner.

from its tendency to make the prosecution's entire case seem credible.'"[12] Note, 79 Harvard L. Rev. 935, 951 (1966) and see cases cited there.

Accordingly, this Court should conclude that the introduction of inculpatory admissions violates a right "so basic to a fair trial that [its] infraction can never be treated as harmless error." *Chapman* v. *California*, 35 L.W. at 4199.

Moreover, the type of "official misbehavior" involved here, requires reversal "simply because society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct." *Chapman* v. *California*, 35 L.W. at 4208 (dissenting opinion of Mr. Justice Harlan). Even the California District Court of Appeals was shocked at the "incredible" and "completely indefensible" trick employed by the authorities to get petitioner to make certain admissions and to "throw herself on the alleged mercy of the sheriff and to suspect her own attorney." *supra* pp. 14-15. Indeed in this case there was "intentional misconduct" by the state at two distinct points: When they intentionally planted Peggy Fisk in petitioner's jail cell; and later when they intentionally introduced Peggy's testimony at petitioner's trial. This is different from *Chapman*, where the making of the unconstitutional remark constituted the only act of intentional misconduct. Here the prosecutor made a calculated decision to introduce evidence which he knew was unconstitutionally obtained; because *he* regarded that evidence as sufficiently damaging to petitioner to warrant the risk of appellate reversal. This Court should not now, on the basis of a cold record,

[12] This observation aptly describes the role of the admission involved in the instant case. Mrs. Miller's admission that she continued to love Hayton even after her husband's death did indeed tend to "make the prosecution's entire case seem credible."

try to second-guess the prosecutor. It should assume, as he did, that such evidence would be prejudicial.

In any event, whether an inculpatory admission obtained under circumstances like those here involved can ever constitute harmless error is a critical question requiring resolution by this Court. This case presents the Court with a record in which this issue is sharply and properly presented, and accordingly the petition for a writ of certiorari should be granted.

III. The Court Should Grant Certiorari To Determine Whether The California Courts Erred In Concluding That The Admissions Introduced In This Case Were Not Prejudicial.

Even if the Court rejects petitioner's argument that all unconstitutionally obtained admissions introduced into evidence must be deemed prejudicial, the record in this case plainly establishes that the California courts were in error when they concluded that the admissions introduced in this case were not in fact prejudicial. In *Chapman* v. *California, supra,* the Court observed that a harmless error rule, such as that applied here, "can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." 35 L.W. at 4199.[13] Petitioner contends that this observation is

[13] This Court has decided that *Chapman* v. *California* will be applied to cases, like this one, which were on direct review on Feb. 20, 1967, the day of the *Chapman* decision. See cases decided on March 13, 1967, 35 L.W. 3320-21. In any event, the Court in *Chapman* did "No more than adhere to the meaning of our *Fahy* case . . . ." *Chapman* v. *California, supra* at 4199. Consequently, no claim can be made that relief is barred under the doctrine announced in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

directly applicable to the circumstances of her case. The question of her guilt or innocence was indeed "a close one" [14] — far closer than that in the *Chapman* case; and the unconstitutional evidence which found its way into her trial was, as petitioner will now demonstrate, extremely "important" (since it was the only prosecution evidence of a disputed critical point) and "persuasive" (since it allegedly came from the lips of petitioner herself). In a case of this type, the

> "question is whether there is reasonably possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced on trial." *Fahy* v. *Connecticut*, *supra*, at pp. 86-87.

The critical factual issue in the trial of this case was whether the fire that caused Dr. Miller's death was of accidental or incendiary origin. (R. 244, 262, 1578, 1809-10). In attempting to persuade the jury that the fire was started by petitioner, the state relied most heavily on petitioner's alleged dual motives for wanting her husband dead: 1) her love for Arthwell Hayton, with whom she had concededly had an affair and with whom, according to the state's theory, she was still infatuated (See e.g., R. pp. 4-5, 10, 12, 1258, 2015, 2019, 2025); and 2) her desire to obtain the proceeds on $100,000 worth of life insurance, of which she was the beneficiary in the event of her husband's accidental death. The defense, it its effort to cast doubt upon the state's motive theory, attempted to show

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[14] The jury deliberated for more than three days. (R. 2376) The District Court of Appeals noted that this case of "circumstantial evidence . . . was bitterly contested," and that "much of the evidence was conflicting." 53 Cal. Rptr. at 727.

that petitioner's infatuation with Hayton had ended before her husband's death. (R. 874, 935, 1783-88)

It is in light of this trial background that the Court must evaluate the impact of Peggy Fisk's testimony that petitioner had admitted to her after Dr. Miller's death that "she had always loved Mr. Hayton and still loves him", that "she did not love her husband", and that she had planned to leave for Europe with the $100,000 in insurance money. (R. 1100-01) This was the only evidence establishing the government's disputed assertion that petitioner continued to love Hayton up to and after her husband's death; and it must have been quite persuasive, coming as it allegedly did from the mouth of petitioner herself.

That the prosecutor regarded Peggy's testimony as important is evidenced by the various ways in which he employed it at trial. In his argument opposing an advisory verdict at the close of the state's case, the prosecutor emphasized petitioner's admission to "the girl up in jail that she still loved Mr. Hayton. She did not love her husband," and the "statement to the girl up in jail concerning the insurance and her plan to go to Europe with it . . . ." (R. pp. 1258-59) Most important, however, and most damaging to petitioner at trial, was the prosecutor's use of Peggy Fisk's testimony in his closing argument to the jury (a use which the California District Court of Appeals failed to mention in its opinion holding the testimony harmless). In his summation, the prosecutor made a number of references to Peggy Fisk's testimony. Quotation of one such reference makes it clear that the testimony was prejudicial:

> How about Mr. Hayton? She testified that her love for him died the same time her husband died . . . . But that's not what she told the girl up in jail. She told

> the girl up in jail that she still loved Hayton, felt that he would come to her. (R. p. 2019) [15]

Could any court confidently say, in the context of this "close" case where motive played such a central role, that there was no "reasonable *possibility* that the evidence complained of *might* have *contributed* to the conviction?" *Fahy* v. *Connecticut*, 375 U.S. at 86, 87 (emphasis added). Has the state, which was "the beneficiary of [the] constitutional error," proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained?" *Chapman* v. *California*, *supra* at 4199. Since this Court cannot, on the record of this case, "declare a belief that [the error] in this case was harmless beyond a reasonable doubt," it should reverse petitioner's conviction so that she may be given a new trial at which the unconstitutional evidence would not be admitted.

At the very least, this court should vacate and remand for reconsideration in light of *Chapman* v. *California*, *supra* which was decided after the last action of the California courts in this case, and which conclusively estab-

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[15] See also R. 2061-62. The prosecutor also made an effort to "justify" the use of an undercover informant to the jury in the following terms:

> He says this putting an undercover agent up in the jail was real dirty . . . .
>
> There seems to be a misconception here and I think it is a rather prevalent misconception that we are playing some sort of a namby-pamby game; . . . every thing we do is scrutinized constantly. This is as it should be. But we are not playing games. [2318]
>
> "Mr. Foley indicated that all these attorneys were taking turns sitting outside the jail cell the first few days to see that nobody talked to her.
>
> "But are we to sit back then and say, well, if somebody can get nine attorneys, well, crime can go uninvestigated? Of course not. [2319]
>
> "Everything that ingenuity could conceive of was done to try to find out what happened . . . ." [2320].

lishes that the District Court of Appeals, in deciding that the introduction of Peggy Fisk's testimony was harmless error, was applying an erroneous constitutional standard. In his opinion, Justice Bray verbalized the rule in a number of different ways. At one point — while discussing defense counsel's alleged failure to object — he remarked that the court would be empowered to order a reversal, despite counsel's failure to object, "if he had the slightest idea that defendant was injured . . . ." 53 Cal. Rptr. at 74. At another point, he remarked that Peggy Fisk's testimony "did little if any harm to defendant." But it is not necessary to undertake a close analysis of Justice Bray's differing verbal formulae. Whatever language he chose to employ, this Court should assume that he was applying the mandatory standard which the California Constitution required him to apply:

> "No judgment shall be set aside . . . unless after an examination of the entire case . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." California Constitution, Art. VI § 4½.

This was the very standard declared unconstitutional in *Chapman* v. *California*. And this was the standard which this Court assumed was applied by the California courts in the numerous cases which, on March 13, 1967, it remanded for consideration in light of *Chapman*, see 35 L.W. 3320-21.

Petitioner urges this Court "to review the facts of this case", *Fahy* v. *Connecticut*, *supra* at 86-87, and conclude that the error requires a reversal of this conviction. If it does not wish to do that at this time, it should vacate the judgment and remand to the California Supreme Court for reconsideration in light of *Chapman*.

IV. The Court Should Grant Certiorari To Determine Whether It Is Unconstitutional For A Prosecutor, Who Does Not Intend To Seek The Death Penalty From The Jury, To Disqualify For Cause Those Jurors Who Have Conscientious Scruples Against Imposing The Death Penalty.

When the jury was being selected, the prosecuting attorney alleged that he might seek the death penalty. Under state law, this allegation permitted him to challenge for cause — not peremptorily — any juror who has conscientious scruples against the death penalty. 59 out of the possible 119 jurors were, in fact, disqualified on this ground. (R. 1a-672a)

It has been widely recognized that jurors who do not oppose the death penalty frequently have many other characteristics relevant in the trial of a criminal case.[16] Prosecutors are well aware of this and consequently favor such jurors — even when they are not seeking the imposition of capital punishment — over those who oppose the death penalty.[17] As sentiment against the death penalty

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[16] See generally, Oberer, "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?" 39 Texas L. Rev. 545 (1961) [hereinafter cited as Oberer] and numerous psychological and sociological authorities cited therein. Professor Oberer's thesis, shared by Dr. Fillmore H. Sanford, Professor of Psychology at the University of Texas, is that "a jury qualified on the death penalty will necessarily have been culled of the most humane of its prospective members. Human sympathy is hardly subject to nice compartmentalization. Jurors hesitant to levy the death penalty would also seem more prone to resolve the many doubts as to guilt or innocence in the defendant's favor than would jurors qualified on the 'pound of flesh' approach." 39 Texas L. Rev. at 549 (citing, among others, Adorno, Frenkel-Brunswick, Levinson and Sanford, The Authoritarian Personality (1950)). See also McClelland, Conscientious Scruples Against the Death Penalty in Pennsylvania, 30 Pa. B.A.Q. 252 (1959).

[17] See Oberer, 39 Texas L. Rev. at 555. Oberer describes a legislative hearing at which an assistant District Attorney mentioned a case

increases — as it is doing — the range of eligible jurors in capital cases decreases.[18] If the right to trial by jury is fully applicable to the states through the Fourteenth Amendment, see *Bloom* v. *Illinois*, 220 N.E.2d 475, certiorari granted, April 18, 1967, 35 L.W. 3363, then this Court should decide whether that right encompasses a jury truly representative of the defendant's peers or a jury composed entirely of the decreasing number of people who take a particular stand on a much disputed issue of public policy.

This record presents the Court with a unique opportunity to consider this important question in a context where the countervailing state considerations are slight indeed. In this case, the prosecutor knew — when the 59 jurors were challenged for cause — what common sense

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"in which the district attorney was 'seriously interested' in obtaining the death penalty. The latter comment led a member of the committee to ask whether there were cases in which a jury was qualified on the death penalty where the prosecution had no real hope of getting capital punishment. The answer of the witness was that while he did not follow this practice, nor did his district attorney, there might be some assistant district attorneys who did so qualify the jury without hope of obtaining a death verdict but in the expectation that a jury so selected would impose a higher penalty than might otherwise be obtained."

[18] Professor Oberer puts this point as follows:

"[T]he gulf between the community and the death-qualified jury grows as the populace becomes the more infected with modern notions of criminality and the purpose of punishment. Accordingly, the community support for the death verdict becomes progressively narrower, with all that this connotes for the administration of justice. Moreover, as the willingness to impose the death penalty—that is, *to be sworn as a juror in a capital case*—wanes in a particular community, the prejudicial effect of the death-qualified jury upon the issue as guilt or innocence waxes; to man the capital jury, the resort must increasingly be to the extremists of the community—those least in touch with modern ideas of criminal motivation, with the constant refinement of the finest part of our cultural heritage, the dedication of human charity and understanding. The due-process implication of this flux seems obvious. 39 Texas L.R. at 557.

obviously dictates: that no prosecutor in this day and age would ask a jury to impose the death penalty on a pregnant woman. Indeed, if the prosecutor had any such thought, he would have explicitly asked the jurors if they had any conscientious scruples about imposing the death penalty on a pregnant woman. (One wonders whether he could have gotten twelve jurors to have responded negatively to that question). Needless to say, at the close of the trial, the prosecutor not only did not ask the jury to impose the death penalty; he agreed to take that issue entirely from the jury's consideration and leave it to the judge, who also was not asked to — and did not — impose the death penalty. Nor did anything happen during the course of the trial which would lend credence to the prosecutor's lame assertion that he simply and conveniently changed his mind about seeking the death penalty.

Accordingly, the Court should assume, on the record of this case, that the prosecutor had no intention of seeking the death penalty and that his only purpose in challenging the 59 jurors was to get a jury composed entirely of people who entertain views otherwise favorable to the prosecution. Whatever valid state interest there may be in having a death-favoring jury in a case where capital punishment is genuinely sought, there is surely no valid interest in having such a jury in a case like this, where there was no intention to seek the death penalty and where the only purpose was to obtain a jury with a set of views favorable to the prosecution. The issue raised by this record is an important one which has not heretofore been determined by this Court.[19]

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[19] See Supreme Court Rule 19(a). Professor Oberer asserts that "No case has been found, . . . where the defense has expressly contended, so far as the reports disclose, that the death-penalty qualification of the jurors, in order to provide the prosecution with an "im-

V. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE INTRODUCTION OF EVIDENCE OBTAINED FROM THE WARRANTLESS SEARCH OF A CAR NOT INCIDENT TO AN ARREST, BUT FOR FIRE INVESTIGATION PURPOSES, CONSTITUTED A VIOLATION OF PETITIONER'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The California District Court of Appeals attempted to justify the warrantless search of the car not incident to an arrest on the following ground:

> [A]t the time the car was taken to the police garage, it was taken not as incidental to an arrest but for the commendable purpose of trying to find out how the fire had occurred. Had the examination of the car shown that the fire had been caused by some condition of the car, there never would have been an arrest. 53 Cal. Rptr. at 738.

This attempted justification raises the issue of whether the police may conduct a warrantless search, not incident to an arrest but for fire investigation purposes, and then introduce the fruits of this search in a criminal prosecution. This is similar to issues now before the court in a number of cases. See *e.g. Sibron* v. *New York,* 18 N.Y. 2d 603, 272 N.Y.S.2d 374, 219 N.Ed.2d 1966, Probable jurisdiction noted, 35 L.W. 3321 (March 13, 1967), *Harris* v. *United States,* 370 F.2d 477 (D.C. Cir. 1966), certiorari granted 35 L.W. 3363 (April 18, 1967); *Camara* v. *Municipal Court,* Prob. jur. noted, 35 L.W. 3124, (Oct. 11, 1966); *See* v. *City of Seattle,* Prob. jur. noted, 35 L.W.

"partial" jury on the issue of punishment, denies to the defendant, as a corollary, a similarly impartial jury on the more basic issue of guilt or innocence. 35 Texas L. Rev. 547.

3124 (Oct. 11, 1966). See note 80 Harv. L. Rev. 123, 125-29 (1966). This court should grant certiorari to decide whether the fruits of a warrantless search not incident to an arrest, but allegedly justified for "the commendable purpose of trying to find out how the fire had occurred," may be introduced in a criminal prosecution.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

IN THE DISTRICT COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
STATE OF CALIFORNIA

Division One
4 Crim. No. 2512

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
LUCILLE MARIE MILLER,
Defendant and Appellant.

OPINION

APPEAL from a judgment of the Superior Court of San Bernardino. Edward P. Fogg, Judge. Affirmed.

Holcomb, Kassel & Ward and Edward P. Foley for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Philip C. Griffin, Deputy Attorney General, for Plaintiff and Respondent.

Defendant appeals from judgment of conviction, after jury trial, of murder in the first degree with life imprisonment.

QUESTIONS PRESENTED

1. Sufficiency of the evidence.
2. Alleged misconduct of the district attorney.
   a. Opening statement.
   b. Cross-examination of defendant.
   c. Examination of witness James.
   d. Cross-examination of Priscilla Slagle.
   e. Impeachment of Dr. Ford.
   f. Evidence of bad checks.

g. Examination of Dr. Modglin.
h. Examination of witness Nourse.
i. Argument.
j. Defendant's attorney's instructions to defendant not to talk.

3. Should prospective jurors opposed to capital punishment have been excused?

4. Admission of evidence.
a. Seach of the Volkswagen.
b. Testimony of the undercover agent planted in defendant's cell.
c. The Hayton affair.
d. Insurance.
e. Experiments.

5. Instructions.
a. Manslaughter.
b. Bad checks.

6. Denial of motion for new trial.

7. Excusing juror #5.

8. Denial of motion to dismiss indictment. (Grand jury proceedings.)

9. Publicity.

1. Sufficiency of the Evidence

The trial was bitterly contested and much of the evidence was conflicting. The case is one of circumstantial evidence substantial enough to support the verdict. We will discuss principally the evidence supporting the verdict.

About 1:45 on the morning of October 8, 1964, defendant came to the door of the home of Mrs. Maurice Swenson in Alta Loma and said, "Help me, help me. My car is on fire. Cork is all burned."[1] Mrs. Swenson invited defendant in and telephoned the sheriff. She then asked defend-

[1] "Cork" was the nickname of defendant's husband, Dr. Gordon E. Miller.

ant if she should call anyone else and defendant asked her to call Harold J. Lance, her attorney. In answer to Mrs. Swenson's call, Lance drove over to her home and was greeted by defendant saying "Cork" was all burned up. While waiting for the sheriff, the three persons talked. Defendant thought she had a bump on her head, but Mrs. Swenson couldn't find one. There was a scent of burned hair on the back of defendant's head. Defendant held a scorched scarf. Her clothes were rumpled, but Mrs. Swenson did not notice any dirt or disarray.

In the meantime, Charles Hogancamp, Chief of the Alta Loma Fire Protection District, had received a fire call and was trying to find the car. He arrived at Mrs. Swenson's house just as Lance and defendant were driving out the driveway. Lance said he was an attorney and suggested that the chief follow him in the fire truck. Defendant seemed uncertain as to the exact location of the burned car. At a point where the road was partially blocked, they saw the car burning. Arriving there, they found the car, a Volkswagen, was burning at the rear around the motor and the rear tires. The door on the left side was wide open. The trunk and the engine lids were closed. There was a body on the seat of the car. Hogancamp's efforts to extinguish the fire failed so he radioed for a pumper which, on arrival, put the fire out. There was an uncapped gasoline can in the passenger compartment immediately behind the driver's seat. This can defendant had bought some days before. Dr. Miller, the body in the car, was dead, having, according to the medical evidence, died in a matter of seconds as a result of the fire.

Lance drove defendant home but returned with her to the scene about 3:00 a.m. There defendant told substantially, though not in as much detail, the same story which later she told Sergeant Robinson at the police station and related on the stand.

The Volkswagen was on the outside of the roadway on the dirt shoulder, a portion of the car being on the pavement. Officer Robinson saw a tire mark made by an inflated tire (not a flat) leading up in an easterly direction to the dirt shoulder portion of the roadway. The dirt shoulder is next to a retaining wall which is four feet high down to a lemon grove. The road was a lonely, dark one, apparently not much used, although defendant testified that she had used it occasionally going to her home. The gasoline can showed no indication of distortion or bulging. It was empty. The threads had a burned residue but were not stripped; the neck was still on it.

The car's tires were deflated except the left front one. They were burned through in different degrees. The right rear wheel was below the surface of the ground in a hole. There was a large rock in the middle of the rear seat. The headlight switch was in the parking light position. The hand brake was off and the gear shift was in low gear.

An autopsy on Dr. Miller's body disclosed large amounts of barbiturates taken two to four hours before death in the bloodstream. These drugs were readily accessible to defendant and her husband, a dentist. The morning of his death, defendant procured some nembutal capsules for him to take. A witness saw defendant driving the car shortly before the fire; a form, which defendant said at the trial was her husband, was slumped over in the front seat and covered with a blanket.

Experts testified that the Volkswagen could not have burned the way it did without an accelerant. As will hereinafter appear, a similar auto was burned under experimental conditions approximating the People's theory of the case, pouring gasoline (accelerant) inside the car, leaving the open can tilted on the back floor, igniting the gasoline while standing outside the car by means of a stick used as a torch (a charred stick was found near the car),

opening the door on the driver's side for draft, etc. The results were similar to those of the Miller car and the gasoline cans were similarly scorched. Other experiments (also hereinafter discussed) indicated that the fire could not have been accidentally caused and refuted defendant's theory that a blown-out tire caused the stopping of the car on the road.

Dr. Miller had considerable life insurance, including double indemnity, payable to his wife, of which defendant had knowledge. Although his practice of dentistry was fairly successful, netting approximately $25,000 yearly before taxes, the Millers had debts of $64,000, of which $30,000 was attributable to the recent construction of their new home, the building of which the doctor did not favor, although he went along with it to keep peace in the family.

Defendant and Arthwell Hayton, an attorney, whose families were close, were even closer; on three different occasions they stayed together in motels. Defendant wanted very much to marry Hayton. The record shows that defendant's involvement was very deep, her having asked Hayton to divorce his wife and having advised Mrs. Hayton to divorce him, but he was content with simple adultery. Finally he became tired of her and did his best to break off the relationship, particularly when she began publicizing their affair and threatened to "expose" him if he would not marry her. In spite of his attitude toward her, the evidence clearly indicates that she was still attempting to contact him and raises the reasonable inference that if she were free to marry she believed Hayton would marry her.

Defendant denied all guilt. She explained her obtaining the barbiturate pills as necessary for her husband's illness. She recounted the details of the night in question. About 7:30 p.m., the doctor drove defendant in the Volkswagen, intending to go to a dry cleaners in Pom-

ons. En route, their car killed a large German shepherd dog and damaged the left front light of the car. The accident upset the doctor because this was the third car of his that had been damaged in four months. Nevertheless, he drove to a hobby shop where defendant purchased glue for her boy's model toys. Then they went to the cleaners. He complained of a headache and asked defendant to drive on the return home. At home, the doctor reclined on a couch and watched television with a pillow under his head and a blanket over him. Defendant joined him under the blanket. When the movie was over, the doctor asked defendant to fix him some hot chocolate. She discovered that there was only about 1/8 gallon of milk left in the refrigerator. She told the doctor that this would not be enough for breakfast if she used any of it for hot chocolate. He suggested that they drive to Woody's Market and get some. The doctor took the pillow and blanket to the Volkswagen, which the doctor had rented. They did not take her car. The doctor climbed into the right front passenger seat, wrapped the blanket around himself and leaned his head on the pillow against the window. Defendant drove and, noticing that her husband was leaning against the door, reached over and locked it. Woody's Market was closed. They then decided to go to the Mayfair. A witness saw them as they approached it. This was about 12:30 a.m. The witness noticed defendant sitting in the driver's seat and what appeared to be a large bundle covered by a blanket with a lump, which could have been a human being, and if it were, the person's head was probably against the window. There was evidence that defendant parked at the Mayfair in a place where the parking lot's lights would not show Dr. Miller's side of the car, nor be likely to awaken him. Defendant went into the market and brought out two half-gallon cartons of milk, placing them on the floor of the

rear passenger compartment of the Volkswagen. She did not notice the gasoline can. The evidence showed that the route she took home was circuitous and long and a rather peculiar one for a woman with a sick husband, as the doctor was that night, to take home at such a late hour. One light of the Volkswagen had been damaged in the dog accident and the condition of the light switch after the accident indicated that defendant drove with only her parking lights on. The last part of the journey was on an unlighted street and defendant was wearing dark tinted glasses.

She was driving at 30 to 40 miles per hour when she felt the steering wheel pull, as in a blow-out. She immediately pulled in the opposite direction. The car went out of control and landed on the shoulder without the application of brakes. She remembers in a sort of subconscious way, wheels spinning, then a large flame behind her. She panicked and the next thing she knew she was standing outside the open door of the car which was in flames. There were too many flames and it was too hot to try to pull the doctor out the door. She ran around the car and tried to open the door on the passenger side. Then she remembered she had locked it. Her next thought was to get a rock and throw it through the window. She found one but could not dig it out of the sand. She found another and threw it through the front window (a nine-pound rock was found on the back seat after the fire). The heat was so intense she could not get the door open. She went down the bank looking for a stick with which to push her husband out of the car but could not find one large enough. She found one too small but nevertheless she hurried with it back to the car. She doesn't know what she did with the stick, possibly she dropped it. She ran in the direction of a car passing a nearby corner. It kept going. She then remembered the home of Mrs. Bridges

at that corner. The house was unlit and she couldn't find it. She turned and went running in another direction. As she passed the burning Volkswagen, she stopped and saw her husband. He was black. She then saw the gasoline can. She ran to Mrs. Swenson's house some distance away.

There were many circumstances shown by the evidence contradicting defendant's story of the action of the auto before the fire started and supporting the prosecution's theory of a deliberately set fire. Among others was evidence that the fire could only have been started by an accelerant; the facts that Dr. Miller was sound asleep from an overdose of nembutal which he wasn't in the habit of taking, and which could only have been given him by defendant, as defendant stated that he did not get the nembutal, that she had purchased it; that defendant drove on a dark, lonely, deserted road; that defendant had given Dr. Miller pills all week which were making him dizzy; the peculiar circumstance that a man recovering from the flu would ride many miles late at night bundled up in a blanket to get milk; that defendant chose the leased car with which she admitted she was not too familiar instead of her larger, more comfortable one; and the fact that the damage to the Volkswagen was not consistent with an accidental fire.

The evidence supported the prosecution's theory that defendant had planned for the car to go over the wall, land on the gas tank and be set afire; that she attempted to drive the vehicle over the edge but was thwarted. The rear wheel spun forward, which would indicate that she was not backing away but trying to get the car to go forward over the edge. As the wheel spun, the car settled on a rock. A reasonable inference can be drawn that defendant had stopped the car on the pavement, spread the gasoline, put the car in low gear and started it toward

the edge, that it was stopped by the shoulder and that after repeated attempts to run the car over the edge, defendant lit the fire. The only parts of defendant's body that were singed by fire were a slight singe of the hair on the back of her head and on her right forearm. This was consistent with the singeing having occurred as she reached towards the gasoline flowing from the tilted can with a burning stick and turned her face away as she lit the fire. As the car was too close to the retaining wall, defendant could not have run around the car to the doctor's side, as she testified, without falling over the wall.

A reasonable inference is that defendant wanted Dr. Miller's body to be consumed to avoid the discovery at an autopsy of the barbiturates. When arrested she had asked the officers if there was enough left of the doctor for an autopsy. Defendant made no reasonable effort to save the doctor after the fire. Defendant was wearing Dr. Miller's watch and no trace was found of his wallet which contained considerable money and from which she took the money to pay for the milk.

The accidental fire theories presented by the defense were contradicted by the prosecution's experts as being highly improbable in view of the condition of the Volkswagen.

There was evidence that defendant was a selfish and avaricious woman who had long before lost all love and interest in her husband and the life he was providing for her. She wanted another man's love, money, social status, prestige, and association with wealthier people.

More of the evidence will hereinafter appear in the discussion of the contentions made by defendant.

2. Alleged Misconduct Of The District Attorney

a. *Opening statement.*

Defendant contends that in his opening statement the district attorney made assertions of fact that he did not

intend to prove and did not prove. As said in *People* v. *Ramsey*, 172 Cal. App. 2d 266, 272, quoting from *People* v. *Chester*, 142 Cal. App. 2d 567, 574:

> " 'it is the duty of counsel to refrain from referring to facts which he cannot or will not be permitted to prove.' . . . But the failure to produce proffered proof, 'either on account of the rules of evidence or for any other reason, does not necessarily indicate prejudice.' (*People* v. *Planagan*, (1944), 65 Cal. App. 2d 371, 407.)"

Unless the record indicates that the statement not later supported by the evidence was made in bad faith or without intention of trying to support it by the evidence, it cannot be said that the district attorney was guilty of misconduct because he failed to produce such evidence. (*People* v. *Wong Hing*, 176 Cal. 699.)

With these rules in mind, we examine the statements of which complaint was made. These are: that defendant felt Dr. Miller was not socially-minded enough; didn't feel he tried hard enough to make money; that defendant liked a higher level of society than the average, liked to associate with well-to-do people, to visit with them in their lovely homes and wanted to mingle with them on an equal basis; that defendant decided that their little home in Ontario wasn't on a par with the homes of some of their friends and she wanted a finer home in a nicer neighborhood; that Dr. Miller was not interested in having a more expensive home and that without his help and entirely on her own defendant decided to have a fancier home and purchased a lot in Alta Loma; that defendant, through one of her attorney friends, arranged for a construction loan to build a house thereon; that some time last year she obtained a new car, a Mustang, and that it had most of the extras obtainable for a Mustang; that the indebtedness for the Mustang was around $3,500, in spite of

other debts; that Dr. Miller was in the hospital when he was served with divorce papers; that Dr. Miller was very unhappy about the divorce and was staying with friends, but that defendant was concerned to keep him working and the income coming in; that she had him to dinner every night, feeding him a special diet because of the doctor's ulcers; that it became more and more clear that they were going to lose their home and everything else if defendant didn't have Dr. Miller's income regularly; that defendant gave some consideration to the possibility of her losing the children because of the divorce and that she pretended to reconcile with her husband primarily for the economic reasons involved.

A prosecuting attorney may state reasonable inferences from the facts he intends to prove and to draw reasonable conclusions. See *People* v. *Lucas,* 160 Cal. App. 2d 305, 308, and *People* v. *Stone,* 199 Cal. 610, 621, 622.

Defendant herself said that for 14 out of the 15 years of her marriage she felt herself rejected; that Dr. Miller was not affectionate towards her; that off and on over the years she wanted herself "unmarried" and that there were times the preceding summer when she wanted to get rid of her husband and marry Hayton. Hayton testified that she liked the society and people he associated with and admired him because he was a successful lawyer. Sprengel a prosecution witness, testified that defendant told him that she had lost her affection for her husband and didn't really care what the doctor thought about it; that he had more or less cut himself off from her and if he tried to do anything about it "he'd get his"; that defendant loved Hayton and would like to marry him and had suggested to Mrs. Hayton that she divorce Hayton; that after the reconciliation between defendant and Dr. Miller, defendant told Sprengel that the reason they had resumed living together was that if she couldn't have

Hayton, a man with $25,000 a year income was better than nothing. These facts, plus the fact that the Millers were in a very bad financial strait, support the statements of the district attorney as to what the evidence would show on these subjects.

Hayton testified that Dr. Miller was opposed to building the new home and said that defendant had said all her other friends were having new homes and she was going to have one. Nourse, the accountant, testified that Dr. Miller was very much against building the new house and was quite disturbed over the fact that defendant had signed his name to a note for $5,000, the money to be used in building the house, but wanted to maintain peace in the family. The accountant who handled the business affairs of the Millers was not consulted about the new house and the funds were borrowed without consultation, defendant having obtained all the financing for the building. The contractor testified that he built the house for defendant; that the only time he talked about it with Dr. Miller was when the latter signed the contract; that he did not discuss any of the financial problems with him; and that defendant had instructed him not to talk to Dr. Miller about the finances.

Defendant introduced evidence to the effect that Dr. Miller did desire a more expensive home and did participate in the commencement of the project. The contradiction caused by this testimony was for the jury to decide and in no wise proved that the district attorney's statements were not supported.

During the separation of the Millers and while they were having financial troubles, Dr. Miller purchased a $3,500 Mustang with air conditioning and gave it to defendant to be her car. A reasonable inference under the circumstances of the case is that defendant wanted the car. In any event, if the district attorney's statement was stronger

than the actual fact, his failure to prove the statement completely was not prejudicial.

Dr. Miller was in the hospital for a month commencing in May. The divorce was filed on July 8. Apparently there was no evidence as to whether the divorce complaint was ever served on Dr. Miller. The district attorney had the right to assume that when the divorce action was filed the complaint would be served. He stated that he wasn't sure Dr. Miller was in the hospital when served.[2] At least, the divorce troubles of the parties were occurring while Dr. Miller was in the hospital and for some time thereafter. The district attorney's statement under the circumstances did not indicate any bad faith on his part.

The evidence showed that Dr. Miller was unhappy about the situation between himself and defendant; and the fact that with the divorce action pending and Dr. Miller living away from home, defendant was providing his diet for dinner, defendant's statement in effect that she returned to him for economic reasons, lends some color to the inference that defendant wanted to keep him working and the income coming in and that it became clear they would lose the house if the doctor did not continue to have regular income. In any event, there was no prejudice.

Although there was no testimony that defendant feared losing her children because of the divorce action, there was always that possibility because of the admitted adulterous affair between defendant and Hayton in 1963 and 1964.

Comparing the opening statement with the evidence adduced and the reasonable inferences to be drawn there-

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[2] The district attorney modified this latter statement by saying that he was not sure but it was right around this time. At any rate, Dr. Miller was recovering from an ulcer.

from, we find no evidence of bad faith upon the part of the district attorney, nor any prejudicial conduct.

b. *Cross-examination of defendant.*

Defendant contends that the district attorney was guilty of misconduct in asking her on cross-examination whether she had stated to anyone that she wished her husband dead. She answered in the negative. No objection or assignment of error was made. The district attorney produced no evidence of such statement having been made. At the hearing of the motion for new trial, the district attorney stated that he had been advised that Yolande Ford would testify that such statement was made to her. Yolande testified, but not to this matter. The district attorney said he thought he had asked the court to order her to return. He found that he had not and then got a subpoena for her appearance, but she could not be located. We cannot say, considering the evidence as a whole, that the district attorney was guilty of misconduct, nor that the asking of the questions was prejudicial.

Defendant had said that this accident seemed "sort of like a movie" she had seen. The district attorney asked her if it was the movie she went to the Saturday before the accident, which movie opens with an auto going off the road and down a cliff, killing the driver. Defendant objected on the ground the question was ridiculous. The objection was overruled. Defendant answered apparently that this was not the movie to which she referred. There was no misconduct in asking the question, as defendant herself had opened the subject of similarity of this accident to that in a movie.

The district attorney asked defense witness Joan Lance whether defendant had told her that she considered herself quite an actress. The witness said, "No." He also asked defendant if she had ever been an actress. She replied in the negative. No objection was made to these questions.

However, when she was asked if she had told the Reverend Teel that she had been an actress, defendant objected and the objection was sustained.

The district attorney asked defendant, "Last spring and summer when you wanted to marry Mr. Hayton, then, I take it that you wanted to get rid of your husband, is that right?" Objection was made to the words "get rid of your husband." After some discussion, the district attorney said he would phrase it another way and asked if during that period "did you want to be unmarried to Dr. Miller?" to which defendant replied, "Toward the end, yes." Defendant contends that the use of the words "get rid of" constituted misconduct. As the district attorney showed what he meant by those words in phrasing the question another way, there could not possibly be misconduct.

In cross-examination, the district attorney asked defendant if a couple of years before her affair with Hayton she had not wanted to marry one Pappajohn. She replied, "No." Defendant then claimed that this question violated an agreement made in chambers that they would not go into any "old romances." The court then sustained the objection and ordered the answer stricken.

The district attorney then asked if defendant periodically had gone to marriage counselors in connection with her marriage problems. She replied that she had gone to a psychologist and to a doctor friend. No objection was made. The district attorney then asked if the visit to the psychologist was in 1960. Then defendant objected and the court sustained the objection on the ground the incident was too remote. There was no misconduct here. The testimony would have been relevant as bearing upon the marital relations of the Millers.

Defendant's direct examination was limited to the events of the day before, and the day of, Dr. Miller's death. She

was not asked concerning her feeling toward her husband or toward Hayton. Prior to cross-examination, defendant sought to limit her cross-examination to that period. A ruling was made limiting the cross-examination, but not to the extent requested by defendant. On cross-examination, defendant was questioned, over objection, as to her relations with Hayton, about her finances, the borrowing of money, the signing of documents, and other matters herein discussed. Defendant contends this questioning was beyond the scope of her direct examination and therefore compelled her to be a witness against herself.

In her direct examination, defendant expressly denied having set fire to the Volkswagen and having murdered her husband. Additionally, her testimony concerning the day of the homicide was carefully designed to convey the impression that she was a dutiful and loving wife, taking care of her husband and lying on the couch with him that evening under a blanket, and that the relations between them were excellent. This opened the door for cross-examination as to the relations between them prior to the fire. The case was dependent upon circumstantial evidence for proof of a homicide, so it was important to show motive and intent. Thus, evidence which would discredit, qualify, and destroy defendant's denials of guilt and claims of good relations with her husband was admissible. This included evidence of her infatuation for and illicit relations with Hayton, the entire financial situation of herself and husband, indications of strife between them, her real relations with her husband, and the other matters brought out. As said in *People* v. *Pike*, 58 Cal. 2d 70:

> "If a defendant takes the stand and makes a general denial of the crime with which he is charged, the permissible scope is very wide. [citations]"

Moreover, as stated in *People* v. *Teshara*, 141 Cal. 633, 638:

> "A defendant cannot, by testifying to a state of things

> contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but without testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies. He can be cross-examined with respect to facts or denials which are necessarily implied from the testimony in chief, as well as with respect to facts which he expressly states."

Defendant was asked on cross-examination if she had not, within 30 days before Dr. Miller's death, talked to a man named James, asking him questions concerning what could be learned by an autopsy. Defendant objected that this question went beyond the scope of the direct examination. The court properly overruled the objection as the matter was relevant, indicating defendant's interest in what could be learned by an autopsy, and at the time of her arrest defendant asked if there was enough of Dr. Miller's body left for an autopsy. (Dr. Miller's autopsy showed an excessive amount of barbiturates.) Defendant first said that she had no recollection of the conversation or the name of the man. The district attorney identified the man as one studying to be a school teacher, and defendant said that it was possible that there was some such conversation and that "This could have come up." When asked if she remembered inquiring of anybody concerning what could be learned in an autopsy she replied in the negative.

c. *Examination of witness James.*

James testified to having had a conversation with defendant concerning autopsies. The district attorney then asked what defendant had said. He replied, "If a coroner's investigation produced a given statement, is it possible that that statement when entered on the autopsy report could have been changed?" Defendant contends that

James' testimony was in impeachment of defendant and hence the impeaching questions should have been framed in the exact language used in the questions put to defendant, and also that the impeachment was on an immaterial matter. As to the latter objection, as we have stated, defendant's interest in an autopsy was material and relevant. James' testimony was not offered as impeachment but as rebuttal to defendant's testimony that she did not have such a conversation and to show her interest in autopsies. The district attorney explained that he did not call James in his case in chief because he did not know of James at that time. There was no error in the cross-examination of defendant or the examination of James.

d. *Cross-examination of Priscilla Slagle.*

She testified to suicidal threats made by Dr. Miller. She was later asked as to when the first time was that Dr. Miller had talked about killing himself. She replied that it was in 1959. The district attorney then asked if it was in connection with an affair defendant was having at that time. She replied that it was not. Thereupon defendant objected and the objection was sustained. She was then asked if defendant had an affair with someone other than Hayton after Miss Slagle moved into the Miller home (this was in 1959). She replied, "No." Defendant then objected and the court sustained the objection and the jury was admonished. The district attorney, in chambers, contended that these questions were competent to disclose the motive for Dr. Miller's admitted depression, talk of suicide, and taking of barbiturates. The court ruled that while the questions might have been pertinent on rebuttal if defendant claimed she and the doctor were getting along all right, it was not proper cross-examination of Priscilla. Defendant contends that the questions went to a period beyond the period to which the court in chambers had previously limited proof of "romances." Where, as here, there was

considerable evidence of lack of affection of defendant for her husband, it was competent for the prosecutor to prove that over a period of years the relationship between the spouses gradually deteriorated. Whether the court properly limited this period to the Hayton affair we are not called upon to decide. In any event, the actions of the district attorney were not prejudicial, particularly in view of the fact that the court in the original hearing, in chambers, had not made any definite limitation, merely stating that the district attorney should not go into "old romances."

e. *Impeachment of Dr. Ford.*

Defendant contends that the trial court erred in allowing the impeachment of this prosecution witness by evidence of contradictory statements, contending that there was no showing of "surprise" because the district attorney had not talked to the witness before the trial and was relying solely on the basis of reports made by officers of statements made to them by the witness. It is not necessary for counsel to have personally talked to a witness in order to claim surprise when the witness testifies contrary to what the counsel had reason to believe he would testify. Thus in *People* v. *Kidd,* 56 Cal. 2d 759, it was held that it was not unreasonable for counsel to assume that the witness's testimony would be the same as a statement attributed to him by the press some six years before and that such statement justified counsel in claiming surprise when the witness testified contrary to such statement.

In *People* v. *Howard,* 226 Cal. App. 2d 281, the surprise upheld by the court as ground for impeachment of a prosecution witness was, as in the case at bench, a statement made to the police by the witness. The court said, at pages 287-288:

> "'[I]t has been held that the trial courts should be liberal in permitting such impeachment, and doubts

should be resolved in favor of allowing the testimony.' (*People* v. *Spinosa* (1953) 115 Cal. App. 2d 659, 668 [252 P. 2d 409].)"

In *People* v. *Pickens*, 190 Cal. App. 2d 138, the failure of the witness to testify similarly to a statement to the police was held to constitute surprise.

As said in *People* v. *Howard*, *supra*, 226 Cal. App. 2d 281, 288:

> "'To permit impeachment of one's own witness in this state, three elements must exist: (1) damage to the party calling the witness; (2) materiality of the evidence; and (3) surprise at his present testimony.'"

Defendant does not contend in her brief that the first two elements did not exist in Dr. Ford's testimony. They clearly existed, as did the district attorney's surprise reasonably based upon the police reports.

f. *Evidence of bad checks.*

Defendant contends that the court erred in permitting Sprengel, the contractor who built the new home for defendant, to testify over objection that in the course of building the house defendant gave him two checks to deposit in the building trust account which were returned for insufficient funds and which defendant later made good. There was no error in the admission of this evidence. It tended to show the financial straits of the Millers and the fact that the financing was done by defendant, rather than by both Dr. Miller and his wife.

g. *Examination of Dr. Modglin.*

Dr. Modglin, the pathologist who examined Dr. Miller's blood after the autopsy, testified that it did not contain enough barbiturates to produce death, but that it did contain enough to produce sleep and was more than a normal therapeutic dose. He was then asked two hypothetical questions: one, whether a person, having taken two barbiturates as sleeping pills and a suggestion is later

made to him to take two more, would take the latter without realizing he had already taken some. The second question was, assuming a man takes one or two barbiturates to insure a good night's sleep and his wife prepares a cup of hot chocolate in which she puts a fairly large amount of barbiturates, would it be likely that the man would detect a difference of taste in the chocolate.

Objections were sustained to both questions. Dr. Ford had testified to the effect that barbiturates have a mind-dulling action and that it is "well recognized in the use of barbiturates that individuals can forget that they have taken some and turn around and take more." There was no citation of misconduct nor request for an admonishment as to the two hypothetical questions. It is doubtful if the first question should not have been permitted to be answered. In any event, there was no misconduct.

h. *Examination of witness Nourse.*

A question was asked by the district attorney of Mr. Nourse, the accountant, as to whether he was contacted by defendant's attorneys the day Dr. Miller died and if they asked him to hand over all his books and records. He replied in the affirmative and an objection was sustained and the answer stricken. Although this question should not have been asked, no assignment nor request for an admonition was made and it does not appear that the asking of the question was prejudicial.

i. *Argument.*

Defendant refers to certain statements of the district attorney in argument, characterizing defendant and her actions. They need not be repeated here, as all of them are supported by the evidence and the reasonable inferences that would be drawn therefrom. The district attorney's right "to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as

to the conclusions fairly to be drawn therefrom." (*People v. Eggers*, 30 Cal. 2d 676, 693.)

Moreover, defendant did not object to any of the statements. As said in *People v. Wein*, 50 Cal. 2d 383, 396, where the court held that it had consistently rejected claims of misconduct where objections concerning arguments of the district attorney were raised for the first time on appeal, saying:

> "... this is not a case where any possible harmful effect ... could not have been obviated by a timely admonition to the jury ..."

j. *Defendant's attorney's instructions to defendant not to talk.*

At the trial, a taped recording of the conversation between Sergeant Paterson and defendant at the police station was admitted without objection by defendant.[3] In this recording was a statement by defendant that her attorney, Lance, was cooperative with the highway patrol at the scene of the accident. She said, "He had me talk to them. I told them everything they wanted to know ..." When they returned to her home, where the coroner and other officers were present, the attorney told her not to talk any more.

In his opening statement, the district attorney said that coroner, deputy sheriff, and highway patrol officer went to defendant's house early in the morning to talk to her, and that they were met at the door by two attorneys who advised them that defendant was under sedation and could not talk to anyone; that they would not permit the officers to talk to her.

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[3] When the recording was offered in evidence to be read to the jury, defense counsel's reaction was to state that he had listened to the tape before and as he recalled there was "nothing in there that is irrelevant or immaterial, but I'd like to check the transcript to see whether or not any part should be deleted." This he did.

This statement was indefensible. However, the defendant not only made no objection to the statement, but also did not object to the fact being admitted in evidence. The district attorney's statement, while inexcusable, was not the kind the effect of which could not have been overcome by a proper admonition of the court to the jury to disregard it, pointing out that it would be not only the right of the attorneys under the circumstances to advise defendant not to talk, but often their duty to do so.

3. Should Prospective Jurors Opposed to Capital Punishment Have Been Excused?

The prosecution announced, at the beginning of the trial, that prospective jurors who had conscientious scruples against the death penalty would be excused; 59 out of the 119 prospective jurors evidenced such scruples. Defendant contends that the prosecution was not in good faith in making the announcement as the prosecution did not intend to ask for such penalty. On the questionable theory that jurors without such scruples are more apt to be convictors than those having such scruples, defendant claims error on the part of the court in excusing said jurors and that she was thereby deprived of a fair trial. Defendant concedes that the excusing of such jurors is proper under the present state of the law, but contends that we should now change the rule and apply it in this case.

Defendant makes the broad statement that the district attorney's alleged insincerity in stating that the death penalty would be sought appears in the voir dire examination of the prospective jurors, but points out no specific place where this appears. Our examination of the transcript in this respect fails to find any support for defendant's contention as to such insincerity. The fact that after defendant's conviction the district attorney stipulated that the issue of penalty could be determined by the court rather

than by the jury, and that presumably the district attorney knew that the punishment would be life imprisonment, does not indicate that the death penalty was originally not to be sought. At the time of the penalty hearing, the district attorney was in a position to review all the evidence in the case and to weigh the probabilities of the jury's inflicting the death penalty as against the expense and strain of a jury trial on the subject.

In *People* v. *King*, 240 A.C.A. 403, the same contention was made as made here, namely that it was error for the trial court to exclude prospective jurors who indicated upon voir dire examination that they were unequivocally opposed to the death penalty. The court first pointed out that section 1074, subdivision 8 of the Penal Code, provides in relevant part:

> "A challenge for implied bias may be taken . . .:
>
> ". . . . . .
>
> "8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case *he must neither be permitted nor compelled to serve as a juror.*" [Emphasis ours.]

The court, in holding the trial court had acted properly in excluding the prospective jurors upon ascertaining their conscientious objections to capital punishment, reviewed many cases in California holding exclusion of such witnesses proper. We see no reason why we should disregard section 1074 and attempt to overrule the cases upon this subject. Indeed, we have no power so to do.

It should be noted that at no time in the trial court did defendant object to the prospective jurors' being questioned along this line, nor to the court's excusing those who conscientiously were opposed to capital punishment.

4. Admission of Evidence

a. *Search of the Volkswagen.*

The Volkswagen started to burn around 1:30 a.m. and continued to burn for some three hours. California Highway Patrol Officer Randolph and Detective Callahan arrived at the scene shortly thereafter and examined it as it stood on the road shortly after 8:00 a.m. Davidson of the Sheriff's Office removed the gas can from its position on the floor in front of the back seat. About 9:00 a.m. the car was taken to a garage about five miles away. There, a nine-pound rock, parts of a Polaroid camera and an instruction book were taken from it. Further examination of the car was made from time to time by the officers. Defendant was arrested without a warrant approximately four hours after the car was removed from the scene.

Expert testimony as to the condition of various parts of the automobile and exhibits consisting of a burned tire, a tire rim, a gasoline cap, a gasoline can nozzle, a gasoline can lid and a light switch, taken from it were introduced at the trial.

In order to quell the fire, the car had been thoroughly opened both in front and in back. The trunk, engine compartment and the passenger compartment were all open to the public and all the car's contents and condition were readily visible. Obviously, at the garage a more detailed study of its condition was made.

Defendant contends that evidence of what was found in the car and its condition was the product of unreasonable search and seizure, citing *People* v. *Burke*, 61 Cal. 2d 575, holding that the search without a warrant of the car of a defendant arrested for burglary, not at the place of arrest but after the car was towed to the police impound lot, was improper, and *People* v. *King*, 60 Cal. 2d 308, holding that a search without a warrant of an auto at a distance away from the place of arrest of a narcotic sus-

pect could not be considered incidental to the arrest. The parties devote considerable portions of their briefs to the question of whether the examination of the auto at the police garage constituted a "search." Assuming that it did, under the circumstances of this case, such a search was not unreasonable. It was the duty of the police where a man had been burned to death in an automobile to find out if they could what had caused the fire. The articles taken from the car were obvious to anyone looking at the car, as was its general condition. However, a more detailed inspection of the car was necessary in the endeavor to determine the fire's cause and to determine whether the fire was accidental or otherwise. This could not very well be done on the public street. Nor could the car be left there to be mauled over by an inquisitive public, which, on learning that a man had lost his life in it, would have been all over the car. The situation is analogous to that where a person suspected of homicide is found in possession of a gun. It has never been held that a search warrant is necessary to enable the police to test that gun by firing bullets from it to determine if the gun was the one used in the killing.

Moreover, at the time the car was taken to the police garage, it was taken not as incidental to an arrest but for the commendable purpose of trying to find out how the fire had occurred. Had the examination of the car shown that the fire had been caused by some condition of the car, there never would have been an arrest.

Cases like *People* v. *King, supra,* 60 Cal. 2d 308, dealing with searches of autos to discover contraband or weapons are not in point. Here, a detailed search of the car which could not be made on a public street was necessary to determine whether the instrument of death—the car—was a criminal or an accidental one.

In a sense, the situation here was somewhat similar to

that in *People* v. *Smith*, 63 Cal. 2d 779, where the court held that the search, without a warrant, of the defendant's car at the police garage after defendant had abandoned it in escaping from the police was proper even though not incidental to his arrest and its removal did not come within the incidental-to-arrest requirement. Although there was no abandonment of the Volkswagen by defendant, the *Smith* case is relevant on the subject of search made when not incidental to arrest.

b. *Testimony of the undercover agent planted in defendant's cell.*

It is almost incredible that in these days of enlightened treatment by prosecution authorities of persons charged with crime, the Peggy Fisk incident could have occurred. Peggy was an undercover agent, working in narcotics and employed by the sheriff. She was falsely booked in the jail as a narcotics violator and placed in a cell with defendant for the purpose of conversing with defendant in the obvious hope that defendant would make some statement helpful to the prosecution. She remained in the cell for approximately a week. Peggy reported from time to time to the officers her conversations with defendant. Peggy testified at the trial to a portion of her conversation with defendant. She, of course, did not tell defendant that she was a law enforcement agent. She did tell defendant that the matters she and defendant discussed should be revealed to defendant's attorney.

Peggy's direct examination was limited to statements made by defendant to the effect that she had not loved her husband, but had respected him; that she had always loved Mr. Hayton and still loved him, and that after the "mess was over" she was going to take the insurance money, which was in excess of $100,000 because of the accidental death, and move to Europe with the children because she did not want them "crucified."

On cross-examination by defense counsel, it appeared that Peggy showed defendant a newspaper clipping concerning the case to indicate to defendant that the press was "ruining her." Under instructions, Peggy told defendant that she had overheard a conversation in the hall between four men whom she thought were from the district attorney's office, in which one of them said, "Getting back to the Miller case, Arthwell Hayton came in and blew the top off the case."

Peggy told defendant that she had talked to the sheriff and that they had discussed Peggy's getting "a floater out of the State." Peggy then said to defendant, "I put all my trust in Mr. Bland [the sheriff] and maybe it would do some good for you if you tried the same." Peggy indicated that she had mistrusted her own attorney and indicated that perhaps defendant should mistrust hers.

On cross-examination defense counsel brought out in some detail statements by defendant to Peggy concerning the events of the fire in which defendant maintained her innocence and told practically the same story she later told on the stand.

When Peggy was called to the witness chair, defense counsel objected "to any testimony from the witness at this particular time" on the ground that he had not been given her address as promised. Thereupon proceedings were adjourned to chambers. Discussion ensued between court and counsel in which the district attorney stated that the witness had not been available until that day, and an opportunity was not given defense counsel to interview her. Defense counsel stated, "I am going to represent to the Court also that any testimony of this witness concerning any statement made by my client would be in violation of the rule in the *Dorado* case. She was an undercover agent, and never informed my client of her capacity. Never advised my client of my client's right to remain silent."

Considerable discussion followed and then the court said, "Well, I think in view of the circumstances related that Mr. Foley [defense counsel] was promised an opportunity to talk to this witness, I think you should withdraw her." The district attorney agreed to do so. Thereupon the following occurred:

"The Court: Now, on the *Dorado* objection—

"Mr. Turner: [deputy district attorney] You would have to wait and listen to the voir dire on the stand and see."

Immediately defense counsel began talking about a case in which it was held that it was error to permit at trial evidence that the defendant had refused to testify before the grand jury relying on the Fifth Amendment. The discussion ended as follows after the district attorney agreed to withdraw the witness until the next morning:

"The Court: In the meantime, you will have the opportunity to talk to her but on the other objection, we would have to have her sworn and at least testify to the preliminary questions anyway, and have an objection made at the proper time.

"Mr. Foley: You know that isn't right, your Honor.

"The Court: Unless you want me to look at this report and see what she knows. Does this report indicate?

"Mr. Turner: There has to be a foundation laid, an objection made. There is no way to—

"The Court: I think there would have to be. I don't see how that could be done in the absence of the Jury."

The following day Peggy was called to the stand. The district attorney questioned her concerning her assignment to pretend being a prisoner and concerning her becoming a cellmate of defendant. He then asked her if defendant had talked to her about her husband and domestic prob-

lems. When he asked what defendant had said in this respect, defense counsel asked permission to ask questions on voir dire. He then brought out that Peggy had not informed defendant of her agency, nor that defendant had a right to have an attorney present when Peggy talked to her. When he asked Peggy if she told defendant of her right to remain silent, Peggy replied, "I told her that she should discuss this with her attorney." Thereupon the direct examination was resumed. At no time during Peggy's testimony was any objection raised, either to her testifying at all or to any question asked of her. While in the in-chamber discussion, defense counsel indicated that he was going to object to her testifying; he did not then nor thereafter ask the court for a ruling. A reading of the entire record of the trial indicates that defense counsel gave defendant an able and skillful defense. In view of that fact, the fact that counsel in the in-chamber discussion had in mind the *Dorado* and *Massiah* decisions; the small portion of the talks with defendant which the prosecution brought out on direct examination which did little if any harm to defendant; the fact that the extensive cross-examination of Peggy brought out that defendant stoutly maintained her innocence and told identically the same story, to which she later testified; and the fact that defense counsel had received a copy of Peggy's reports to her superiors concerning her talks with defendant, it is reasonable to assume that defense counsel was willing to have Peggy testify to show (1) the extremes to which the sheriff went to try to convict defendant and (2) that defendant's story of her innocence had never varied.[4]

The trick attempted by the authorities in which they

[4] See *People* v. *Valdez*, 239 A.C.A. 481, 488, where the court refused to permit, on appeal, the raising of an *Escobedo-Dorado* question not raised below and which the court presumed the trial counsel felt was to his benefit not to raise.

apparently hoped to obtain incriminating statements from defendant and to get her to throw herself on the alleged mercy of the sheriff and to suspect her own attorney was completely indefensible, and if we had the slightest idea that defendant was injured by it we would have no hesitancy in ordering a reversal in spite of the fact of defendant's failure to object to Peggy's testimony. However, to do so just to administer to the sheriff and those joining in this most inexcusable procedure a well-merited rebuke where no injury occurred to defendant therefrom would not be fair to the County of San Bernardino nor to defendant in requiring her to undergo the strain of another trial.

We have in mind *Massiah* v. *United States*, 377 U.S. 201 [84 S. Ct. 1199]; *People* v. *Dorado*, 62 Cal. 2d 338; and *Escobedo* v. *Illinois*, 378 U.S. 478 [84 S. Ct. 1758], but do not consider, under the peculiar circumstances in this case, there was any prejudicial error. Moreover, as pointed out in *People* v. *Palmer*, 236 Cal. App. 2d 645, 650, referring to *Escobedo*, failing to object in the trial court precludes raising the matter on appeal, the court saying:

> "But the Supreme Court indicates, at least inferentially, in the same authorities that the raising of the issue on appeal, after the enunciation of the rule in the *Escobedo* case, must be based upon an objection taken in the court below."

See also *People* v. *Valdez*, 239 A.C.A. 481, 487, applying the same rule as to an *Escobedo-Dorado* situation.

c. *The Hayton affair.*

It was the prosecution's theory that one of defendant's motives in killing her husband was to leave her free to marry Hayton. Defendant on two occasions moved the court, in the absence of the jury, to deny admission of any evidence concerning the relationship between Hayton and defendant on the ground that the prosecution's evidence

did not come up to its offer of proof in chambers and because there was evidence that the affair had terminated. With the exception of one statement made in the offer of proof, the evidence did come up to the offer of proof and the failure to prove that statement did not affect the showing that defendant's relationship with Hayton supplied both intent and motive for Dr. Miller's murder.

> "No rule is more firmly established than that, upon the trial for murder of husband or wife, evidence tending to show illicit relations of the accused with another is admissible to show lack of love and affection for the defendant's lawful spouse." (*People* v. *Smith*, 55 Cal. App. 324, 335.)

In that case, there was evidence of a reconciliation between the defendant and his wife effected some time prior to the wife's death, but that fact did not prevent proof of the adulterous acts of the husband prior to the reconciliation.

In *People* v. *Brown*, 131 Cal. App. 2d 643, the defendant attempted to kill his wife. The court said, at page 661:

> "His relation with other women was relevant to his bad relation to his wife which deserves consideration in the matter of motive."

People v. *Soeder*, 150 Cal. 12, was a prosecution for the murder of the defendant's brother-in-law to obtain insurance money which the defendant thought would enable him to succeed in winning a certain young woman. This situation was disclosed by letters the defendant had written her. In a final letter, he declared the engagement broken and demanded a return of his presents. The court held that although the evidence of the other letters was impaired by the last letter, their effect was not destroyed thereby; that it could not be held that the letter showed as a matter of law that the defendant had given up all hope that with the money in his possession he could win the woman. Thus, in the instant case, defendant's claim

that she was no longer interested in Hayton is by no means conclusive.

In July 1964, Hayton took a young woman to a square dance and then to his boat at Newport Beach. Defendant and Priscilla Slagle followed them and while Hayton and the woman were on board untied the boat so that it would bob up and down. When Hayton and friend left the boat, defendant and Priscilla followed. Hayton recognized defendant in the Volkswagen and succeeded in losing her in a sudden exit from the freeway. After delivering his companion to her home and returning to his house, he found the Volkswagen parked there. An acrimonious conversation with defendant followed, the substance of which was that Hayton didn't want to have anything more to do with her and she objected to his having avoided her. Defendant testified that from then on she no longer was interested in Hayton and contends that, therefore, there could be no claim that she killed her husband so that she might marry Hayton. However, the evidence discloses that she still was interested in him and a reasonable inference may be drawn therefrom that although he continued to keep aloof from her, she felt that she could win him if she were not encumbered by a husband. The next day after the boat incident, she telephoned Hayton at his home and apologized for her conduct of the previous evening. Among other things, she stated that she wanted to be nice to him and for him to be nice to her and asked him to come over to her home that evening. After telling her that he did not want to see her, Hayton hung up. She called him again twice that night, endeavoring to get him to come to see her or let her come to see him. She also had Priscilla telephone him, urging him to come over to see her.

Thereafter, defendant repeatedly tried to talk to Hayton on the telephone, but he had instructed his secretaries

not to refer her calls to him. She went to his house on two occasions, using as an excuse that her daughter wanted to see his daughter.

On July 31, she telephoned Sprengel, who recorded the conversation apparently to give it to Hayton, urging him to get Hayton to talk to her, as she knew "if he'd talk to me, we could straighten it out," referring to his "hate" for her. (Defendant also recorded this conversation.) She said that Hayton would "weaken" if he saw her and that "He feels like I am a threat to his stubbornness." Although she told Sprengel that Hayton's emotional entanglement with her was over after the boat incident and after she went back to her husband, her entire conversation with Sprengel indicates that she still wished such entanglement.

On September 22, defendant showed Mrs. Sprengel a letter and stated that if she had married Hayton she would have destroyed the letter, and that in spite of things that had recently taken place she still loved him; that this was not the sort of thing you could turn on and off. (It was in this same month that defendant told Mrs. Sprengel that Dr. Miller had threatened suicide, on one occasion saying that he would drive his car off a cliff.)

On October 8, Sergeant Paterson found in defendant's purse a business card of Hayton's and two Christmas place cards, one with the name Arthwell (Hayton's first name), the other with the name Lucille.

On direct examination, Hayton had told how, after their three intimate occasions at motels, he had been pursued by defendant, of her desire to divorce her husband and marry him, of her asking him to divorce his wife, and that he had told her he didn't want her to talk like that, that he loved his wife and would not divorce her.

During the cross-examination of Hayton by defendant, her counsel informed the court that he proposed to ques-

tion Hayton about conversations he had with defendant concerning an affair in 1963 with a girl named Bonnie; that he had left his wife because of Bonnie, thinking he would divorce his wife and marry Bonnie; that his wife had given him a certain number of days to get rid of Bonnie. The court sustained objections to this proposed testimony. Defendant contends that this was error, as she contends it would tend to disprove the fact that he ever said to defendant that he would not think of divorcing his wife in order to marry defendant. The testimony of Hayton in this respect was not offered to prove the contents of the statement, but merely to show defendant's responses thereto and the intimacy existing between Hayton and defendant. Whether in April 1963 Hayton might have been willing to divorce his wife was irrelevant. Moreover, it is clear that in 1964 defendant wanted to marry Hayton and that her own testimony showed that he, for whatever reason, was trying to get rid of her, without complete success. The court's ruling that the matter proposed to be elicited on cross-examination was irrelevant and immaterial was correct. It was the type of matter concerning which the court said, in *People* v. *Harlan,* 133 Cal. 16, 20:

> "... cross-examination, tending to show the general immorality of the witness, or specific acts of immorality, should never be allowed in any case for the mere purpose of discrediting or impeaching the witness. [citations]"

See *People* v. *Blalock,* 238 A.C.A. 256, 271.

It is well settled that the extent to which a cross-examination may be carried rests largely in the discretion of the trial court. (*People* v. *Morlock,* 46 Cal. 2d 141, 149.) The court did not abuse its discretion in limiting in this respect the cross-examination of Hayton.

Hayton testified that defendant, over the last five years, discussed with him her desire to divorce her husband and

asked him to represent her in a divorce action. When the district attorney asked him if several years ago alimony had been discussed, defendant for the first time objected on the ground of its being a privileged communication. The objection was sustained. Thereupon the district attorney, without objection, brought out that Hayton didn't handle divorce actions and in any event would not represent her because of their very close relationship. She never retained him as her attorney and told Hayton that she was talking to him as a friend and not as an attorney.

The district attorney then examined Hayton as to his relations with defendant and the many conversations he had with her. At no time did defendant object or raise the question of privilege. Although for a short period Hayton's law firm represented Dr. and Mrs. Miller in a personal injury suit, none of the conversations testified to by Hayton related to that action. Defendant now contends that although no objection was made to Hayton's testimony, the court should have excluded it on the ground of privileged communications and thereby protect defendant from the "incompetence of her own attorney." Under the circumstances here, the fact that the communications were not privileged, and there being no attorney and client relationship at the time, the court was not called upon to act.

d. *Insurance.*

The prosecution contended that one of defendant's motives in killing her husband was that she could enjoy the proceeds of his life insurance policies. The evidence shows that defendant was the beneficiary of policies which, in the event of Dr. Miller's accidental death, would pay her approximately $100,000; that defendant knew of these policies. Nourse testified that in 1963 he discussed with the Millers the insurance program. Defendant told Sergeant Paterson that she knew of a $20,000 policy and a $50,000 policy, as well as a dental association policy of

a few thousand dollars; that the $20,000 policy was definitely double indemnity, and that she thought the $50,000 policy was also. Defendant contends that the insurance evidence was improperly admitted because the only connection between defendant and the insurance was that she had knowledge of it. Obviously, her knowledge of the insurance and the double indemnity phase of it was clearly admissible on the question of motive. Its weight was a matter for the jury. Evidence of the financial condition of the Millers was relevant to show the marital strife that existed and a cause of animosity of defendant towards her husband; to prove that defendant was in the habit of spending a great deal of money and would therefore need the insurance proceeds and was interested in marrying Hayton who was financially better off than Dr. Miller.

e. *Experiments.*

Defendant contends that the court abused its discretion in allowing evidence of three experiments on the ground that there was no similarity of conditions between the facts of this case and those of the experiments.

The first experiment was by Davidson, the criminologist, to determine whether a nail driven into a Volkswagen tire and thereafter traveled upon would cause a leak or a blowout. After the fire, the left front tire was still inflated, and the other three were down and partially consumed by fire. The right front tire had a nail imbedded in it. Davidson testified that he saw no evidence of a blowout. The defense contended that defendant's loss of control of the Volkswagen, to which she testified, might have been caused by a blowout due to this nail. Davidson's experiment included driving the tire 63 miles with the nail in it at speeds up to 55 miles per hour, without losing any of the air in it. Defendant's contention of lack of similarity of conditions is based upon the fact that the burned Volks-

wagen tire evidently picked up the nail while moving, while the experimental tire received its nail while stationary.

> "'[T]he determination whether the conditions were sufficiently similar to make the experiments of any value in aiding the jury is a matter resting in the sound discretion of the judge.' [citations] 'The conditions surrounding a test or experiment of this nature need not be identical with those existing at the time of the occurrence in question provided there is substantial similarity.'" (*Beresford* v. *Pacific Gas & Elec. Co.*, 45 Cal. 2d 738, 748.)

The sole dissimilarity pointed out by defendant between the two tires did not cause the court's ruling to be an abuse of discretion. It is interesting to note that defendant did not object to the admission of the experimental tire in evidence.

The second experiment was also conducted by Davidson and was to test the amount of pull necessary to remove a neoprene tubing from a gas line similar to a Volkswagen line, both dry, wet and soaked with gasoline. Defendant's only objection to testimony concerning the experiment was that the facts were not similar in that the witness was asked how much pull it took when the tube was dry. When told that the experiment dealt with the tube when dry, wet, and very wet, defendant made no further objection. The witness produced the wet tube used in the experiment and defendant asked that it be shown to the jury and made no objection to its being offered in evidence. There was no abuse of discretion in allowing evidence of the experiment.

The third experiment testified to was an experimental burning of a Volkswagen similar to that in which Dr. Miller met his death, to prove that a fire started in the passenger compartment with a gasoline accelerant could

transmit itself to the engine compartment, burn away the flex neoprene tube gasoline line and permit the gasoline to drain from the tank to the ground and burn the engine compartment, as was claimed to have happened to the Miller Volkswagen.

Snare, who testified to the incendiary nature of the fire which consumed the Miller Volkswagen, also testified to the experiment. No objection was made to this testimony and defendant cross-examined him at some length concerning the experiment.

Sergeant Davidson testified for a short period concerning the experiment without objection and then defendant objected on the ground of lack of similarity of the conditions of the two fires. The main purpose of the experiment was to illustrate that a fire started inside the passenger compartment could spread to the under surfaces and engine compartment of the car. Such dissimilarities in conditions as there were, were not of crucial significance in determining the ultimate question above stated. The court refused to permit a showing of the movie taken of the experiment on the ground that it would tend to confuse the jury. The record shows that the court considered carefully the contentions of defendant as to dissimilarity of conditions and was of the opinion that the dissimilarity of conditions was not such as to affect the validity of the experiment. There was no abuse of discretion in the allowance of evidence of the experiment.

When Davidson was testifying to the condition of the Miller Volkswagen the day after the fire, defendant asked whether the debris in it was wet or dry. The prosecution objected on the ground that the question called for speculation. If the ruling was wrong, no prejudice resulted, as Snare had testified that that morning there was some moisture in the debris.

5. Instructions

a. *Manslaughter.*

The court instructed and gave possible forms of verdict on murder in the first and second degrees. It gave no instructions or form of verdict on manslaughter. Defendant contends that the court erred in this respect. However, she points out no evidence which would have justified a verdict of manslaughter. It was the position of the prosecution that defendant deliberately set the fire which killed her husband. It was defendant's theory that the fire was caused through no fault or intention of hers. Defendant claims that her testimony that the auto "suddenly swerved as she was driving it; that it came to a stop on the shoulder of the road; that she saw a flame spouting from the rear of the passenger compartment; that she got out of the car, tried to rescue her husband but was unsuccessful in her efforts" justified a manslaughter instruction, but fails to state how her acts as testified could possibly constitute manslaughter.

A party is entitled to an instruction on an included offense if there is any evidence, even though weak, to show such an offense. (*People* v. *Carmen*, 36 Cal. 2d 768, 773.) Voluntary manslaughter is a willful act, characterized by an intent to kill, *engendered by sufficient provocation*, and by the absence of premeditation, deliberation (by presumption of law), and malice aforethought. Section 192, sub-division 1 of the Penal Code defines voluntary manslaughter as the unlawful killing of a human being, without malice, "upon a sudden quarrel or heat of passion (*People* v. *Brubaker*, 53 Cal. 2d 37, 44)." Nor could involuntary manslaughter possibly apply. Under the definition of this crime (see Pen. Code § 192), there must have been an unlawful act committed or the commission in an unlawful manner of a lawful act which might produce death. It is not contended that any such acts occurred.

There were no circumstances in the case at bench which could possibly bring the killing here within the definition of manslaughter. It was either murder or defendant was not guilty of any crime.

> "An instruction which finds no support in the record, even though a correct statement of an abstract proposition of law, is improper when it finds no support in the evidence, and it is ground for reversal if it is calculated to mislead the jury." (*People* v. *Moore*, 43 Cal. 2d 517, 530.)
>
> ". . . if it must be said as a matter of law that, accepting the defendant's version of what took place, the crime could not have been manslaughter, the defendant was not entitled to such an instruction [manslaughter]." (*People* v. *Zilbauer*, 44 Cal. 2d 43, 49.)

Neither under defendant's version of the evidence nor that of the prosecution could manslaughter apply. It would have been error had the court instructed on manslaughter had defendant requested it.

b. *Bad checks.*

The witness Sprengel testified that during the construction of the house which he was building for defendant, two checks executed by defendant to deposit in the building trust account were returned by the bank for insufficient funds. They were later made good by defendant. Defendant states, "No instructions were requested or given to show the limited purpose for which such evidence was admitted" and that the court erred in not instructing concerning such limited purpose. When the evidence was offered, the district attorney, in answer to defendant's objection that it was immaterial and irrelevant, stated that it was to show the sketchy financial basis of the family.

After admission of the evidence, defendant moved to strike on the ground that the testimony tended to prove

another crime. The district attorney stated that he was not trying to prove a crime, but merely trying to prove the financial condition of the Millers. The motion was denied. Neither then nor at any other time did defendant request a limiting instruction. There was no error in the failure to give such an instruction, first because none was requested, and second because it clearly appeared that defendant had no intent to defraud but the "bouncing" of the checks was due to the financial difficulties of defendant and her husband at the time.

The evidence was admissible on the issue of motive to show that because of financial pressures on the Millers, there was animosity of defendant toward her husband and a desire on her part to get rid of her husband. There was evidence that defendant was having difficulty in financing the construction of the house and that Dr. Miller, because of the financial problems involved, was reluctant to go ahead with the project.

As stated in *People* v. *Lopez,* 60 Cal. 2d 223, 249:

> "... evidence that is relevant is not excluded because it reveals the commission of an offense other than that charged."

It is well settled that when evidence is admissible for one purpose, but inadmissible for another, the right to limiting instructions is waived if not requested at the trial. (*People* v. *White,* 50 Cal. 2d 428, 430-431; *People* v. *Williams,* 202 Cal. App. 2d 387, 396.)

6. Denial of Motion For New Trial

Defendant contends that the court abused its discretion in denying the motion for new trial on the ground of newly discovered evidence. Prosecution witnesses Snare, the arson expert, and Ofner, the Volkswagen expert, testified that an engine compartment fire in a Volkswagen would cause the engine to stop running. Defendant, after judgment, moved for new trial on the ground that

she had learned of two Volkswagen fires which she claimed completely contradicted the prosecution's witnesses on this subject and supported her experts at the trial. Accompanying the motion were supporting affidavits.

Robert A. Blotter and James McGrain, in 1962, over two years prior to the instant fire, told of Blotter's Volkswagen having caught fire,[5] apparently from the engine, and being burned to a similar extent as defendant's car.

Neither the district attorney nor his witnesses ever contended that a Volkswagen could not catch fire. Their evidence was directed to the point that defendant's did not. The proposed after-discovered evidence was offered to prove that a Volkswagen could catch fire, which was not an issue in the trial.

A motion for new trial is a matter within the sound discretion of the trial court; such motions are looked upon with disfavor and unless there is a clear showing of abuse of discretion, the appellate court will not interfere. (*People* v. *Williams,* 57 Cal. 2d 263, 270.) Among other requirements is that:

> "'it must appear . . . 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on retrial of the cause . . .'" (*People* v. *Williams, supra,* 57 Cal. 2d 263, 270.)

The proposed evidence at most would have been merely cumulative of a point not disputed: that a Volkswagen

[5] There was also the affidavit of Barton Keene, defense counsel's investigator, to which was attached a transcript of a conversation which he alleged he had with one Mrs. Mary Baker in which she informed him that her Volkswagen had caught fire in September 1964 in the motor department. Apparently defendant places no reliance upon this affidavit as a ground of newly-discovered evidence, as she does not refer to it in her brief. Obviously it is hearsay, and, in the absence of an affidavit by Mrs. Baker, could not be considered on the motion.

can catch fire of its own accord. There was no error in denying the motion for new trial.

7. Excusing Juror No. 5

On the third day of the trial, Juror Conway sent a letter to the trial judge. It read:

> "Until recently I felt that I could be a fair and impartial juror in the Miller case. I now find that it would be impossible for me to render a verdict of guilty against Mrs. Miller although the evidence might *indicate* that she is guilty. Under these circumstances I feel that I should be disqualified from serving as a juror in the Miller case." [Emphasis added.]

When this note was called to the attention of counsel, the district attorney moved that the juror be excused for cause and replaced by an alternate. Defense counsel said:

> "The juror has been listening to testimony now for some two and a half days, and it could very well be that his decision now is influenced quite a bit by some of the testimony that he has heard, so we'll object to him being withdrawn as a juror."

The court made a finding of good cause for discharge, overruled the objection, and seated an alternate juror.

Defendant now contends that because the juror used the words, "indicate that she is guilty," he was not saying he could not return a guilty verdict if the evidence proved her guilty beyond a reasonable doubt, and therefore he should not have been removed. The letter, when read as a whole, does not support such an interpretation, particularly in view of the final sentence, in which the juror, knowing his own mind, says he feels that he should be disqualified.

Section 1073 of the Penal Code gives one of the grounds of challenge:

> ". . . existence of a state of mind on the part of the juror in reference to the case, or to either of the par-

> ties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, which is known in this Code as actual bias."

The juror, in effect, said that he had such a state of mind.

Defendant apparently now contends that the court should have taken evidence from the juror. However, the record fails to show that any request for an examination of the juror was made by defendant. Moreover, in view of the juror's flat statement of bias in the letter, an examination of the juror would have been a waste of time.

In *People v. Taylor*, 189 Cal. App. 2d 490, 495, the court referred to Penal Code, section 1089, and said:

> "Under the section a juror may be substituted without jeopardy attaching if good cause for dismissal of the juror exists [citation]. What constitutes good cause rests largely in the discretion of the trial court. Where a juror states his doubt as to his ability to perform his duty justly good cause exists."

Juror No. 5 had no doubt on this subject. The motion was denied.

8. Denial of Motion to Dismiss Indictment (Grand Jury Proceedings)

Defendant moved under section 995 of the Penal Code for a dismissal of the grand jury indictment for lack of probable cause and alleged irregularities. The motion was denied by Judge Kerrigan. Defendant now contends that because, after denial of the motion, Judge Kerrigan later accepted disqualification to try the case we should dismiss the indictment.

Defendant did not attempt to disqualify Judge Kerrigan at the hearing of the motion. On October 30, defendant moved Judge Kerrigan for a dismissal of the indictment under section 995, Penal Code. The hearing was

then continued to November 4 in Judge Kerrigan's department. On that date defense counsel stated that he would not challenge the judge under the provisions of section 170, Code of Civil Procedure (the so-called peremptory challenge section), but, "I am going to request that the Honorable Court disqualify itself on the hearing of my motion under 995." The district attorney opposed the request on the ground that no reason was given. The judge then "respectfully denied" the request, but pointed out that counsel had the right to challenge under section 170. Defense counsel then reiterated that he was not making a challenge but merely a request. Defense counsel then stated that as the court had already considered the evidence before the grand jury on a previous application for bail, he would submit the 995 motion. The court denied the motion. Defendant requested permission to then plead, and defendant's plea of not guilty was entered and the case set for trial. Later, pursuant to 170, the judge was challenged to prevent him from presiding at the trial. He granted the challenge and the case was transferred to another department where it was tried. Defendant, in effect, by failing to file a challenge of the judge, consented to his deciding the motion. Applicable here is the statement in *Calhoun* v. *Superior Court,* 46 Cal. 2d 18, 32:

> "The contention that the trial judge was biased against Calhoun in ruling upon his motion to set aside the indictment does not affect the legal sufficiency of the evidence to justify the indictment . . ."

The test, on a motion under section 995, Penal Code, to set aside the indictment, is whether the defendant was indicted without reasonable or probable cause.

> "Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt

of the accused." (*Bompensiero* v. *Superior Court*, 44 Cal. 2d 178, 183.)

The evidence before the grand jury showed probable cause and was such as would justify a reasonable person in believing that the fire which caused Dr. Miller's death was caused by defendant. The witnesses who testified at the trial: Snare, Robinson, McIntosh, Chaplin, Debra Miller, Slagle, Davidson and Masarik, gave substantially the same testimony before the grand jury.

We proceed to the alleged irregularities occurring before the grand jury which defendant contends required a dismissal of the indictment.

The district attorney, in his opening statement to the grand jury, stated that when the highway patrol officer, deputy coroner, and a deputy sheriff, came to defendant's home the day of the burning of the car, they were met at the door by two of her attorneys and were refused permission to talk to her, and that her attorneys had advised quite a few persons, including Debra, defendant's daughter, not to cooperate. Likewise, a highway patrol officer testified that defendant's attorneys would not let him question her. There was no excuse for such statement, nor for the officer's testimony. Such actions were indefensible. However, in view of the testimony heard by the grand jury establishing probable cause, and the fact that the district attorney instructed the jury that its decisions must be based on the evidence adduced alone and not on anything he might say to them, it would be unreasonable to assume that but for the statement and the officer's testimony the grand jury would not have indicted defendant.

Witness Snare gave his opinion before the grand jury that the fire was of incendiary origin. The district attorney then asked, "That means that someone deliberately

started this fire?" The witness replied, "Yes." There was no impropriety in asking this question.

Also indefensible, but not of grave importance, was the district attorney's query of Debra Miller as to whether she was told by defendant's attorney to give the answer to one of his questions, which apparently he did not like.

The sheriff's criminologist, Davidson, testified to the amount of barbiturates he found in Dr. Miller's blood and that a person with that amount in his blood would at least be in a very deep sleep, and that with some barbiturates this amount would be nearly a lethal level. Davidson's testimony as to his training and experience in connection with barbiturates shows defendant's contention that Davidson was unqualified to testify in this respect to be unfounded.

9. Publicity

Defendant contends that due to adverse publicity she was denied a fair trial. There can be no question but that in San Bernardino County the Miller case was a *cause celebre*. However, under all the circumstances, we do not believe that the publicity attendant upon Dr. Miller's death deprived defendant of a fair trial. Moreover, it appears that defendant insisted on going to trial at that time and in San Bernardino County.

The first trial under the indictment commenced December 2, 1964. On December 7, the court granted defendant's motion for new trial based principally on a specific instance of adverse publicity occurring immediately before the first trial. Defense counsel then stated:

> "I feel, number one, that this matter would be better off if this matter were put off for some two or three months and my client let out on bail. In the alternative, then we must seek an early trial date as soon as possible, definitely before the 16th [the 90th day

from the filing of the indictment] preferably starting next Monday, if possible."

The district attorney then suggested that the trial be put over between 30 to 60 days "to give this furor a chance to die down." Defense counsel then said that he could not permit defendant to sit in jail another 30 or 60 days; that defendant was entitled to a trial within the 90 days of the filing of the indictment. The court then denied the motion for bail and set the trial date for January 11, 1965. Defense counsel then stated that he saw no reason why an earlier date of trial could not be had. The court explained that because of the holiday season, the Jury Coordinator would have difficulty in obtaining a representative group of citizens as jurors. Defense counsel then contended that defendant was not getting a speedy trial.

On December 21, the district attorney moved for a continuance of the trial date in order to appear at a hearing on a temporary restraining order obtained by defendant from the federal court. The court stated that it would continue the date of trial to January 25. Thereupon, defense counsel stated that if the court would reconsider and leave the date of trial at January 11, he would dismiss the federal court proceeding so that there would be no necessity for a continuance of this case. The date of January 11 was then reestablished.

The record shows that defendant sought no remedy for the publicity situation, asked for no change of venue, and instead of asking for delay to permit time to pass insisted on an early date of trial, except on the condition that she be released on bail. Defendant apparently weighed the question of adverse publicity against her reasons for desiring a speedy trial. It may very well be that the defendant considered that there was an advantage in her being tried while still pregnant.

The voir dire examination of the jurors selected indicates that the publicity concerning Dr. Miller's death had not affected them. Although all but one of them had read something about the case, none of them had formed or expressed an opinion concerning defendant's guilt or innocence. None of them had read the articles which were concededly adverse to defendant and had caused the new trial. In *People* v. *Duncan*, 53 Cal. 2d 803, 812, where the court upheld the trial court's denial of a motion for change of venue, the court said:

> "Even if it be assumed that many persons formed opinions unfavorable to defendant as a result of what was published, it does not follow that persons without such views could not be found to act as jurors or that those who had adverse opinions would be unable to set them aside and try the case fairly on the basis of the evidence to be produced in court."
>
> "The mere fact that veniremen had read articles about the arrest would not necessarily require a change of venue." (*People* v. *Saugstad*, 203 Cal. App. 2d 536, 546.)

The jurors in this case all said they had open minds and would decide the case on the evidence produced without regard to any outside considerations.

Although the jurors had been aware of the earlier publicity, they did not remember the particulars, had formed no opinions, and those who had heard opinions expressed stated that they would not be influenced by any opinions they had heard. Moreover, defendant exercised only one-half of the peremptory challenges to which she was entitled and did not raise the question of adverse publicity at the trial.

Defendant complains of an order of the trial judge to the effect that transcripts of the proceedings on the motion for mistrial which contained the newspaper articles

which brought about the mistrial would not be included in the record on this appeal, and requests that we order them brought up. We see no reason for doing so. None of the jurors selected to try the case on the second trial had read these articles, and in view of all the answers on voir dire of these jurors and defendant's failure to raise the question of publicity, it would appear that the matter of publicity was water under the bridge.

In *People* v. *Modesto*, 62 Cal. 2d 436, the court, in upholding the trial court's refusal to grant a motion for change of venue or ordering a change of venue on its own motion, considered important the fact that there appeared no difficulty in securing jurors who were not aware of the earlier publicity and the facts that defendant did not exhaust his peremptory challenges nor renew his motion which had been denied without prejudice. The court held that from all the circumstances the trial court could reasonably conclude that the defendant could secure a fair trial in the county.

In *People* v. *Parker*, 235 Cal. App. 2d 100, the court refers to the publicity problem in these words:

> "Defendant's objection to trial hard upon the heels of unfavorable publicity evokes a problem of widespread interest. The frequently conflicting demands of fair trial and free news dissemination are currently the subject of soul-searching by the judiciary, the organized bar and the responsible publishers and broadcasters. A salient phase of the problem is assurance of fair trial by an impartial jury selected in a community atmosphere which may have been preheated by unfavorable pretrial publicity."

and, inter alia, the opinion states:

> "California law evinces a policy permitting acceptance of jurors who, after contact with pretrial news reports, commit themselves to impartiality and fair-

ness. (Pen. Code, § 1076; *People* v. *Duncan*, 53 Cal. 2d 803, 812-816 [350 P. 2d 103]; *People* v. *Daugherty*, 40 Cal. 2d 876, 889-890 [256 P. 2d 911].)"

In that case the defendant had not renewed his motion for a continuance because of the publicity, just as in our case defendant made no motion for continuance of the second trial. What the court then said is applicable here:

"We have carefully read the transcript of the impanelment proceeding. It must have convinced counsel, as it convinces us, that whatever the news stories actually said, they did not really create an emotional climate substantially impeding selection of an impartial jury." [p. 106]

Judgment affirmed.

(s) BRAY
*J.**

WE CONCUR:
COUGHLIN
Acting P. J.
WHELAN
J.

I, GEO. J. KOBELIN, Clerk of the District Court of Appeal, Fourth Appellate District, State of California, do hereby certify that the preceding and annexed is a true and correct copy of opinion as shown by the records of my office.

WITNESS my hand and the Seal of the Court this 21st day of February A.D. 1967.

GEO. J. KOBELIN
Clerk
By ILLEGIBLE
Deputy Clerk

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* Assigned by the Chairman of the Judicial Council.

Appendix B.

IN THE DISTRICT COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
STATE OF CALIFORNIA

Division One

4th Crim. No. 2512

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
LUCILLE MARIE MILLER,
Defendant and Appellant.

BY THE COURT

[Modification of opinion (245 A.C.A. 111) on denial of rehearing. Judgment of Superior Court affirmed.]

The opinion heretofore filed herein is modified in the following respects (page references are in volume 245 A.C.A.):

On page 126, line 25, the following is stricken: "The rear wheel spun forward, which would indicate that she was not backing away but trying to get the car to go forward over the edge. As the wheel spun," and the following inserted in lieu thereof: "As the rear wheels spun,".

On the last line of page 129 and the first line of page 130, strike the following: "for a month commencing".

On the third line of page 146, strike the following: "(Defendant also recorded this conversation.)".

On line 22 of page 146, strike the following: "On direct examination, Hayton had", and insert in lieu thereof the following: "Hayton".

The petition for rehearing is denied.

Dated: October 20, 1966.

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IN THE

Supreme Court of the United States

October Term 1966
No. 1383

LUCILLE MILLER,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California.

RESPONDENT'S OPPOSING BRIEF.

Statement of the Case.

Petitioner Lucille Miller was indicted for the murder of her husband, Gordon Eugene Miller, on October 20, 1964. She had been arrested on October 9, 1964, the morning after her drugged husband had been burned alive in the family Volkswagen which she had been driving. She was charged with violation of section 187 of the Penal Code of the State of California and was found guilty of that charge by a jury with a finding of murder in the first degree. Her motion for a new trial was denied and she was sentenced to life imprisonment.

On Appeal, the California Fourth District Court of Appeal, by a unanimous decision, affirmed the judgment of the trial court. See *People v. Miller,* 245 A.C.A. 111, 53 Cal. Rptr. 720. Hearing in the Supreme Court of the State of California was denied on December 14, 1966.

Statement of Facts.

Gordon Eugene Miller died in a matter of seconds as a result of an incendiary conflagration started in the passenger compartment of his car, with an accelerant, on a dark, lonely, deserted road while sound asleep from an overdose of nembutal, which he was not in the habit of taking and which had not been in his system for more than two to four hours, and petitioner, his wife, was the only person who could have given him the drug which she had procured without his knowledge and started the fire, and she had long since lost her affection for him and given it to another man. This capsule summary of the facts was conclusively supported by the evidence which is sufficiently set forth in the Opinion of the Fourth District Court of Appeal.

Questions Presented by Petitioner.

It is contended by petitioner that certiorari should be granted on the following grounds:

1. Statements obtained in violation of petitioner's right to counsel improperly admitted into evidence.

2. Misconduct of the district attorney in the *voir dire* of the jury on the issue of capital punishment.

3. Evidence obtained as a result of an unlawful search and seizure of the Miller automobile.

These contentions are deemed by respondent to be without merit and are herein controverted and opposed on the grounds that there was no violation of petitioner's constitutional rights to counsel and of self-incrimination in the introduction of her statements to the undercover agent; that petitioner has waived the right to complain about the introduction of her statements by failure to object in the trial court; that in a capital case the prosecution is entitled to inquire whether jurors have conscientious scruples against imposing the death penalty which would prevent them from finding the defendant guilty and imposing the death penalty; and that there was no unreasonable search and seizure of petitioner's automobile.

ARGUMENT.

I.

No Substantial Federal Question Is Presented Under Petitioner's Contention That Statements Were Obtained in Violation of Her Constitutional Rights to Counsel and Against Self-Incrimination.

Petitioner contends that she has established a substantial federal question based upon the introduction of statements made to an undercover agent which were introduced into evidence at her trial. She contends that the statements were obtained in violation of the rules set forth in the case of *Massiah v. United States*, 377 U.S. 201 (1964), and the case of *Escobedo v. Illinois*, 378 U.S. 478 (1964). No substantial federal question is presented by petitioner because the record fails to establish that the undercover agent obtained statements from petitioner in violation of *Massiah* and *Escobedo*, *supra*. Furthermore, petitioner intentionally waived the right to complain about the introduction of her statements when she did not object to the testimony. In any event, the testimony was merely cumulative of evidence already properly admitted so that its introduction was harmless beyond any reasonable doubt. In fact, the Fourth District Court of Appeal in effect held that it did not have the slightest idea that petitioner had been injured by the introduction of her statements to the undercover agent.

Before the undercover agent took the witness stand the prosecution had already proved that appellant's motive had been to get rid of her husband so that she could be free to marry another man. While she waited for him, she did not want to have money problems;

thus the insurance proceeds, in excess of $100,000, were an additional motivating factor. The underlying motive for the murder was shown to be the fact that appellant was a selfish and avaricious woman who had long before lost all love and interest in her husband and the life he had provided her. She wanted another man's love, money, social status, prestige, elegant surroundings, and association with wealthier people.

There had been testimomy by Walter R. Nourse, the family accountant, that during 1964 the victim's income had been $15,299.76 after business expenses [Rep. Tr. p. 940] and that in 1963 he had talked over insurance on the victim's life with petitioner. [Rep. Tr. p. 1952.] There was testimony that she told Erwin Sprengel, the man who built her new home, that she disliked her husband and that if he interfered with her new house plans he would "get his." [Rep. Tr. pp. 829-830.] Sprengel testified that within three months of the murder petitioner told him that she had lost any affection whatsoever for her husband and instead loved another man and wanted to marry him. [Rep. Tr. pp. 827-832.] Sprengel testified that after having filed for divorce and separated from her husband she resumed living with him only for the money he could earn. [Rep. Tr. pp. 832-833, 909.] There was testimony that in late August, a little over a month before the murder, petitioner told Erwin Sprengel's wife, Marilyn, that she had the trump card over the other man in their relationship. [Rep. Tr. pp. 924-925.] On September 22, 1964, two weeks before the murder, petitioner told Mrs. Sprengel that in spite of the things that had recently taken place, that she still loved the other man; that this was not the sort of thing that you could just turn off. [Rep. Tr. pp. 930-935.]

There was testimony that she told the investigating officer that she had gone with the other man about six months; that she had discussed this romance with her husband; that she did not love her husband; that he had rejected her for years; and that he had lived with the knowledge that she loved the other man. [Rep. Tr. pp. 1058-1061.] She told the investigating officer that she knew her husband had over $100,000 in life insurance and that she was the beneficiary. [Rep. Tr. pp. 1070-1071.]

After the brief testimony of the undercover agent to the effect that petitioner had not loved her husband but had respected him, that she had always loved the other man and still loved him, and that as soon as this mess was over that she planned to take her daughter Debbie and the two boys away to Europe with the insurance money of over $100,000 because of the accidental death [Rep. Tr. pp. 1098-1101], there was further testimony on this subject from civilian witnesses. Harold J. Lance, her attorney, testified that she was the beneficiary of nearly $100,000 in life insurance on the victim's life. [Rep. Tr. pp. 1194-1198.]

Arthwell Hayton, the other man, testified that earlier in the year she had told him that she had never loved her husband, that her marriage was a mistake, and that she did not want to live with him any more. [Rep. Tr. pp. 1119-1120.] He testified that they carried on a motel affair, the last time within three months before the murder. [Rep. Tr. pp. 1181-1182.] He testified that about six months before the murder she proposed marriage to him as soon as they could divorce their respective mates. [Rep. Tr. pp. 1121-1125.] He testified that he declined to marry her but that she per-

sisted in the months that followed (his wife having conveniently died two days after petitioner's illicit proposal of marriage). [Rep. Tr. pp. 1125-1134, 971-979.] Petitioner continued to pursue Hayton with loving attention and assistance with his children in his time of grief. She did not deny that she had told people that Hayton was going to marry her and move to her house. Her activities were noticed by the community; and Hayton, to preserve his reputation, decided to break with her. Petitioner was furious. The obstacle to her plans was an unwanted and unloved husband. Petitioner called Hayton's secretary to tell her to shut off the phone calls that were advising Hayton against her, and she told the secretary that she intended to marry Hayton. [Rep. Tr. pp. 971-972, 979.] Petitioner had been involved in an automobile accident and asked Hayton, an attorney, to take her case. She used this device to have him come over to her house, but he still refused to renew their affair. Petitioner waited for the community furor to calm down and then she asked Hayton to come to her. He again refused, but she bided her time and eventually he did come to her and he weakened to her charms on June 22, 1964, when they went to a Palm Springs motel together. [Rep. Tr. pp. 1130-1134, 1182-1183, 1215.] From this point on, it was clearly shown by her statements that she believed that if she could get Hayton to meet her, she could control him through sex. [Rep. Tr. pp. 858-866.] During this period after Hayton broke off the affair petitioner telephoned him constantly to establish contact, but he was either curt with her or would not talk to her at all. She maintained contact with him through his children and friends. She pumped their mutual friend Erwin

Sprengel for information about him and asked Sprengel to take messages to him, telling Sprengel that she loved and wanted to marry Hayton. [Rep. Tr. pp. 827-829, 830-832.]

Petitioner filed for divorce July 8, 1964. Hayton began to show interest in other women, and petitioner's reaction was outrage and foolish retribution when she followed Hayton while he was on a date with another woman and tried to wreck his boat with him and his date aboard. It gave her an opportunity to once again get close to him when she waited outside his home for him to return from the date. At that time she expressed her jealousy and the intention never to be cast aside by him. She revealed her vicious capabilities by threatening to expose him to public ridicule through the disclosure of his immorality. [Rep. Tr. pp. 983-988, 1134-1145, 1217.]

Toward the end of July, a little over two months before the murder, when the friction between petitioner and Hayton had had a chance to cool down, she once again approached him with repentance and sweetness on the telephone. When this tack was unavailing and she was again rejected, she became furious and resorted to the most vile of threats to expose Hayton to the community. [Rep. Tr. p. 1147-1158, 984.] Petitioner attempted to have further blackmail threats pass to Hayton through Sprengel when she revealed a tape recording she had made in the Cadillac on one of their clandestine dates and other "incriminating" evidence, as well as the threat of an outraged husband's vengeance. She told Sprengel that she did not want Hayton to hate her, and that if she could talk to him she could soothe him and he would weaken. [Rep. Tr. pp. 853-879.]

In light of this damning evidence on the issue of motive to be rid of her husband, the brief direct testimony of the undercover agent, occupying one page of the Reporter's Transcript, pales and is placed in its proper perspective in the case. The testimony was of minor significance and it is abundantly clear beyond any reasonable doubt that the testimony was cumulative and therefore harmless.

When the undercover agent was called to the stand as a witness for the prosecution, petitioner's counsel raised an objection that he had not been furnished with the witness' address as promised. At the suggestion of the court, proceedings were then continued in the judge's chambers outside of the hearing of the jury. [Rep. Tr. pp. 1007-1008.] Once in chambers counsel for petitioner said [Rep. Tr. p. 1009]:

> "I am going to represent to the Court also that any testimony of this witness concerning any statement made by my client would be in violation of the rule in the Dorado[1] case. She was an undercover agent, and never informed my client of her capacity. Never advised my client of my client's right to remain silent.
>
> "I previously had served on the District Attorney and the Sheriff of this County a demand to be present at any interrogation of my client by any agent of the Sheriff's office. So, any testimony of this witness concerning any statement made by my client not only violates the rule in the Dorado case, but the rule in People versus Sharer as well, and also the rule in Massiah versus the United States."

[1](Footnote ours.) *People v. Dorado*, 62 Cal. 2d 338.

The district attorney offered counsel for the defense an opportunity to interview the witness, and counsel took advantage of that opportunity. [Rep. Tr. pp. 1009-1010.] The district attorney stated [Rep. Tr. pp. 1010-1012]:

> "Now, so far as the rest of it, the right under the Dorado case and Massiah case and the rest of them, the right of a witness, a defendant to remain silent. It is a defendant's right, not an attorney's. The defendant may waive this right, provided the defendant does so intelligently, knowingly and understandingly. This is the gist of all of those cases.
>
> "Now, this particular witness did not interrogate his client. She specifically told her, the testimony will be that she specifically advised Mrs. Miller not to talk. Her testimony will be that Mrs. Miller told her that her attorneys had advised her that there probably would be somebody in jail trying to pump her and Miss Fisk, as part of her technique, I suppose, told Mrs. Miller: 'Well you shouldn't talk to anybody except your attorneys and the Sheriff,' and, of course, she never did talk to the Sheriff, so that is beside the point.
>
> "She stayed up in the jail with her for about a week and listened and when Mrs. Miller would talk to her, on two or three occasions, she told her 'Don't tell me about it,' but Mrs. Miller insisted on telling her. It is Mrs. Miller's right and privilege to talk, if she wants to.
>
> "Nobody pumped her. Nobody interrogated her. No attempt was made to force her to talk at all. She did talk, and some statements which she made

which are material to this case, we will desire to have her testify about them, and statements in the report which Mr. Foley saw last December."

The trial court suggested that the prosecution withdraw the witness and give counsel an opportunity to talk to her, but that on the other objection she would have to be sworn and at least testify to the preliminary questions and have an objection made at the proper time. [Rep. Tr. p. 1015.]

The following morning the undercover agent was the first witness. She was called to the witness stand and asked preliminary questions as to her occupation and the fact of her undercover placement in petitioner's jail cell. The district attorney asked her if petitioner had talked about herself, the reason she was in jail, about her husband, and about any domestic problems she had had. At that point petitioner's counsel asked to take the witness on *voir dire,* at which time he asked if she had informed petitioner that she was a law enforcement agent, of her right to remain silent, and of her right to have an attorney present. The witness testified that she told appellant that she should discuss this with her attorney. Counsel for petitioner closed his *voir dire* examination and the direct examination was resumed. Counsel for petitioner did not interpose any objection whatsoever to the testimony of the undercover agent. Nor did defense counsel attempt to lay any foundation that there had been any process of interrogation that lent itself to eliciting incriminating statements. He was clearly cognizant of the *Escobedo* and *Massiah* decisions, for he had raised the point in chambers before the undercover agent was called as a witness. He took the witness on *voir dire;* did not

establish any facts remotely resembling a process of interrogation on the part of the undercover agent; but in fact established with two minor exceptions, that the undercover agent was specifically instructed only to listen to petitioner and that she had followed those instructions. [Rep. Tr. p. 1112.] Later, in cross-examination, counsel developed that the undercover agent had brought certain things to the attention of appellant which might have provoked comment by her; however, it was never shown that any incriminating statements whatsoever were provoked by these matters.

Counsel for petitioner made no attempt to have the testimony of the undercover agent stricken. A great deal of her testimony was favorable to the defense, for it brought out that petitioner stoutly maintained her innocence and told identically the same story, to which she later testified. Defense counsel had received a copy of the undercover agent's reports to her superiors concerning her talks with petitioner, and it is reasonable to assume that defense counsel was willing to have the undercover agent testify to show the extremes to which the sheriff went to try to convict her and to show that her story of innocence had never varied. Having deliberately chosen to waive her constitutional objection to the testimony of the undercover agent and to present the undercover agent's highly favorable testimony to the jury petitioner cannot now have her cake for she has eaten it.

It is the law in the State of California that the raising of the issue of denial of counsel during interrogation on appeal, after the enunciation of rule in *Escobedo,* must be based upon an objection taken in the court below. *People v. Perez,* 62 Cal. 2d 769, 774;

People v. Davis, 62 Cal. 2d 791, 795-796; *People v. Palmer,* 236 Cal. App. 2d 645, 650; *People v. Brown,* 238 Cal. App. 2d 924, 929; *People v. Almond,* 239 Cal. App. 2d 46, 49; *People v. Martinez,* 239 Cal. App. 2d 161, 166; *People v. Valdez,* 239 Cal. App. 2d 459, 466; *People v. Robinson,* 239 Cal. App. 2d 579, 587; *People v. Woods,* 239 Cal. App. 2d 697, 705; *People v. Arnold,* 243 Cal. App. 2d 510, 515; *People v. Larke,* 246 A.C.A. 646, 649-650; *People v. Hansard,* 245 A.C.A. 720, 726. The California cases place emphasis on the fact that the decision to waive objection to the introduction of statements of the accused can be attributed to a tactical decision by trial counsel. As pointed out above, the tactics of counsel in the instant case were obvious. The federal courts will deny a defendant relief if the state courts refuse to entertain federal claims on the merits where a defendant for strategic and tactical reasons deliberately bypasses state procedures. *Fay v. Noia,* 372 U.S. 391, 439 (1963).

Under California law counsel for petitioner could have requested that the trial court take evidence outside of the presence of the jury on the issue of whether the statements made by petitioner to the undercover agent were voluntary and were not obtained in violation of petitioner's right to counsel. *People v. Schader,* 62 Cal. 2d 716, 727-728. In that case the California Supreme Court held that pursuant to the case of *Jackson v. Denno,* 378 U.S. 368 (1964), and the case of *People v. Gonzales,* 24 Cal. 2d 870, 876-877, this procedure should be followed by the trial court. Counsel for petitioner made no such request for the obvious reason that after having reviewed the report of the

undercover agent and after having interviewed her, he determined that it was in the best interest of his client that the undercover agent be permitted to testify. This is the only reasonable conclusion that can be drawn from the record. The trial court had not ruled that counsel would not be permitted to introduce evidence on the issue of the introduction of the undercover agent's testimony. There had been no objection, no complaint, and no ruling on the issue of *Massiah* and *Escobedo* decisions. There had merely been a discussion in chambers of the applicable law which was never renewed by counsel. An objection not raised at the trial will not be considered on certiorari to the United States Supreme Court. *Brown v. Allen,* 344 U.S. 443, 480 (1952). A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. *Henry v. Mississippi,* 379 U.S. 443, 447 (1965).

Petitioner relies on some language in the Opinion of the Fourth District Court of Appeal in the instant case in arguing that there is no waiver in the State of California when there is a deliberate failure to object to the introduction of statements obtained in violation of the *Massiah* and *Escobedo* decisions. In its Opinion the District Court of Appeal said (p. 143):

> "And if we had the slightest idea that defendant was injured by it we would have no hesitancy in ordering a reversal in spite of the fact of defendant's failure to object to Peggy's testimony."

The reference to the failure to object was dictum because the court went on to hold that petitioner herein was precluded from raising the point by reason of the

failure to object. *People v. Miller, supra,* 245 A.C.A. 111, 143-144. The above statement was made to emphasize the fact that there was no possible prejudice from the introduction of the undercover agent's testimony and was a remarkable example of prescience in view of this Honorable Court's recent decision in *Chapman v. California,* 35 U.S.L. Week. 4197 (1967). The Fourth District Court of Appeal undertook a thorough examination of all aspects of the case and although it did not express the rule of harmless error beyond reasonable doubt in those terms, it clearly reached that conclusion regarding petitioner's statements to the undercover agent.

Petitioner contends that the nature of the questioning in the instant case was identical to that in *Massiah* (surreptitious questioning by Government agent). On the contrary, there was no process of interrogation undertaken by the undercover agent and the statements were entirely spontaneous on the part of appellant. The *Massiah* and *Escobedo* cases are not in point, because in both cases the statements obtained were held to have been the result of a process of interrogation. Of course the case of *Miranda v. Arizona,* 384 U.S. 436 (1966), decided after petitioner's trial, is not applicable to this case. *Johnson v. New Jersey,* 384 U.S. 719 (1966). The contention of petitioner in the absence of a record showing that her statements were the result of a process of interrogation is clearly subject to the rule that this Honorable Court will not review questions not clearly raised on the record. *Standard-Vacuum Oil Co. v. United States,* 339 U.S. 157, 160 (1949). The circumstances of this case preclude any conclusion that the statements of petitioner made in the presence of the

undercover agent fall within the exclusionary rule of the *Massiah* and *Escobedo* decisions.

It is well established that the authorities charged with law enforcement may place an agent in a jail cell so as to overhear incriminating statements on the part of an accused. *Lopez v. United States,* 373 U.S. 427, 438-439; *People v. Lopez,* 60 Cal. 2d 223, 248. So long as incriminating statements are not elicited by a process of interrogation, the information obtained by such an agent is admissible and does not violate the rules of *Massiah* and *Escobedo.*

Appellant's statements to the undercover agent were not confessions as defined in *People v. Speaks,* 156 Cal. App. 2d 25, 34, and *People v. Ferdinand,* 194 Cal. 555, 568-569, but were instead merely admissions as defined in the last cited case. Appellant's statements to the undercover agent were nothing more than a reiteration and duplication of various statements already properly introduced into evidence and were therefore entirely cumulative. In that respect admission of the statements was not prejudicial under California law. *People v. Jacobson,* 63 Cal. 2d 319, 331; *People v. Cotter,* 63 Cal. 2d 386, 398.

There is no necessity for this Court to grant certiorari to determine whether inculpatory admissions obtained in violation of the *Massiah* and *Escobedo* cases can ever constitute harmless error. This Honorable Court has already expressly declined to adopt any rule that a constitutional error, regardless of the facts and circumstances, must always be deemed harmful. *Chapman v. California, supra,* 35 U.S.L. Week. 4197 (1967).

II.

No Substantial Federal Question Is Presented Under Petitioner's Contention That She Was Deprived of a Jury of Her Peers by the Disqualification of Prospective Jurors Who Had Conscientious Scruple Against Imposing the Death Penalty.

Petitioner contends that this Honorable Court should grant certiorari to determine whether it is unconstitutional for a prosecutor, who does not intend to seek the death penalty from the jury, to disqualify for cause those jurors who have conscientious scruple against imposing the death penalty. The Opinion of the District Court of Appeal at 137-139 points out that the record does not disclose that the prosecutor did not intend to seek the death penalty from the jury. The Opinion is a complete answer to petitioner's contention. We would merely add the language of the California Supreme Court in the recent case of *People v. Gonzales*, 66 A.C. 494, 509-510:

> "Gonzales takes issue with the final sentence above quoted and urges a reconsideration of our position. It is argued that the institution of 'death qualified' jurors in capital cases denies the defendant the right to be tried by a 'fair and impartial jury' of his peers. (Pen. Code § 1078; U.S. Const. amend. VI.) Because (1) a *guilt* jury from which persons opposed to the death penalty have been excluded is not a representative sample of the community, and (2) such an unrepresentative jury is neither fair nor impartial in its *guilt* determination due to the fact that persons without conscientious scruple against the death penalty tend to be persons with the kind of 'authoritarian personality'

which is more responsive to the prosecution's case than to the defendant's case. (Citing Oberer, *Jury Selection, The Death Penalty,* and *Fair Trial,* 71 Case and Comment No. 4, p. 3; Adorno et al., The Authoritarian Personality (1950).)

"These arguments, while superficially attractive, simply do not stand against the reasoning of our *Smith* and *Gilbert* cases. First, as to the matter of 'representative sampling,' it is clear that such an ideal has never been the practice of the criminal law. The very reason for challenges for cause is to weed out that part of the random sample having characteristics thought to render objective judgment difficult. Second, as we pointed out in *Smith* and *Gilbert,* the legislature through its enactment of section 190.1 of the Penal Code (see footnote 9, *supra*) expressed a preference for a single jury qualified to act throughout both phases of a case involving the death penalty. 'Such legislative preference for the same jury at both trials deprives the defendant neither of due process nor of the right to an impartial jury. Since all of the evidence properly introduced at the trial on the issue of guilt is relevant in determining the penalty (Pen. Code, § 190.1), having the same jury avoids repetition of evidence and is thus not an arbitrary requirement.' (*People v. Gilbert, supra,* 63 Cal. 2d 690, 712; see also, Report to the Board of Governors of the Committee on Criminal Law and Procedure, 41 State Bar J. 798, 799.) Third and finally, it should be observed that section 1074, as interpreted by us in *Riser,* compels the exclusion of all prospective jurors whose 'conscientious opinions'

would prevent the proper exercise of the discretion contemplated by section 190. This certainly means that challenges for cause pursuant to section 1074 should be granted where it is made to appear that a prospective juror's predisposition *in favor of* the death penalty would prevent his voting for life imprisonment in a proper case. It is therefore difficult to see how either the prosecution or the defense could be favored by a proper administration of section 1074 of the Penal Code. (See *People v. Gilbert, supra*, 63 Cal. 2d 690, 712.)"

The rule of procedure suggested by petitioner that the prosecutor declare whether or not he will seek the death penalty before the trial and thereafter be bound would be subject to undesirable results. This in effect would exert force on a district attorney who had a conscientious feeling that it was a case justifying the death penalty at the beginning and who subsequently changed his opinion that it was a case justifying life imprisonment to unreasonably hold to the first opinion lest he be accused of misconduct. No such pressure should be exerted upon the office of the district attorney. It is only at the time of the penalty hearing that a district attorney will be in a position to review all the evidence in the case and to weigh the desirability and the probability of the imposition of the death penalty by the jury as against the expense and strain of a jury trial on the subject. In addition, the jury knows that a murder case is one where the punishment may be death and this knowledge will influence a juror with conscientious scruple against capital punishment unless that juror is told that the prosecution is not seeking death penalty and probably even if the juror is told. The

prosecution should not be required to weaken its case by telling the jury that the case is not serious or definite enough to warrant the higher penalty. It is respectfully submitted that petitioner has set forth neither justifiable nor established ground to object to the procedure which was followed in the selection of the jury in the instant case.

III.

No Substantial Federal Question Is Presented Under Petitioner's Contention That There Was an Unreasonable Search and Seizure of the Automobile and Its Contents.

Petitioner contends that this Honorable Court should grant certiorari to determine whether the introduction of evidence obtained from the warrantless search of a car not incidental to an arrest, but for fire investigation purposes, constituted a violation of petitioner's rights under the fourth and fourteenth amendments to the United States Constitution. In petitioner's brief filed in the District Court of Appeal below, petitioner did not set forth the nature of the evidence that was the product of an unreasonable search and seizure other than to indicate that the burned-out Miller Volkswagen was examined by police experts. There was expert testimony as to the condition of various parts of the automobile and there were some exhibits introduced consisting of a burned tire [Ex. 23], a tire rim [Ex. 24], a gasoline cap [Ex. 36], a gasoline can nozzle [Ex. 36], a gasoline can lid [Ex. 38], and a light switch [Ex. 43]. All of the above items were plainly in view without the necessity of a search. All the parts of the automobile were plainly open to view without the necessity of a search. The only act that was necessary on the part

of the experts was to brush aside some ashes to reveal the gas can tops.

The Miller Volkswagen had been thoroughly opened, both in front and in the back, as well as in the passenger compartment, in order to quell the fire. It had been burned up and totally destroyed and was towed off the highway. The trunk, the engine compartment, and the passenger compartment were all opened to public view. The officers and experts did no more than that which any person on the premises could have noticed. Naturally the officers and the experts were examining what they could see with more scrutiny than an ordinary member of the public.

In *Bielicki v. Superior Court,* 57 Cal. 2d 602, 605, the court gave the following explanation of the term "search" as used in the fourth amendment of the United States Constitution and in article I, section 19, of the California Constitution:

> "'[T]he term implies some exploratory investigation or an invasion and quest, a looking for a seeking out. . . . A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way.' [Citation.] The constitutional guarantees, of course, prohibit not all searches but only those that are 'unreasonable.' [Citations.] And 'there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.' [Citations.]"

The rule is settled in California that looking through a window and viewing that which is patent and visible

to the public does not constitute an unreasonable search. The fact that an officer may tend to observe more accurately than the public at large does not change the situation. *People v. Holloway,* 230 Cal. App. 2d 834, 839. In that case the court said:

> "The essence of the search is the viewing of that which was not only intended to be private or hidden, but that which was, so far as the one search is able to do so, made concealed or closed from open viewing. . . ."

Equally well settled in California is the rule that observing that which is in plain sight in an automobile is not a search. *People v. Murphy,* 173 Cal. App. 2d 367, 377; *People v. Terry,* 61 Cal. 2d 137, 152.

In view of the above cited cases it is abundantly clear that no unreasonable search and seizure took place in the instant case but merely an examination of that which was patent and obvious in the lawful investigation of a possible arson-murder. It should be pointed out that most of the evidence that was gathered by the prosecution was utilized by the defense in its theory of an accidental fire. It would seem that there was no harm to appellant by reason of circumstantial evidence obtained from the car by the prosecution, but only in the reasonable inferences to be drawn therefrom.

The Opinion of the District Court of Appeal impliedly assumes that there was no search and seizure in the instant case. The Opinion merely assumes for the sake of argument that there was a search when it goes on to say that the examination of the car was reasonable for the commendable purpose of trying to find out why the fire had occurred. We respectfully submit

that the Opinion of the District Court of Appeal is correct and that petitioner has raised no substantial question of unreasonable search and seizure.

Conclusion.

This concludes the response to the petition in the instant case. Respondent believes that when the record is examined relevant to the matter complained of, and the Opinion of the California District Court of Appeal is considered, it will be concluded that no right guaranteed by the Constitution of the United States was violated, and that the judgment should stand. Accordingly, respondent submits the matter on the record heretofore presented to this Court, respondent's brief in the Court of Appeal and Answer to Petition for Hearing in the Supreme Court, the Opinion of the California District Court of Appeal, and the arguments set forth above, and requests that the relief asked by this petitioner be denied.[2]

Respectfully submitted,

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[2]We herewith lodge copies of respondent's brief in the Court of Appeal and respondent's answer to petition for hearing in the Supreme Court to be included in the record pursuant to Rule 21(6).

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 154

LUCILLE MILLER,
PETITIONER,

v.

STATE OF CALIFORNIA,
RESPONDENT.

REPLY BRIEF BY PETITIONER FOR A WRIT OF CERTIORARI TO THE CALIFORNIA DISTRICT COURT OF APPEAL

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This reply brief will be limited to the points raised by respondent under Roman numeral I in its opposing brief. Petitioner will answer respondent's major arguments in the order in which they were made by respondent.

A) *Was the undercover agent's testimony "merely cumulative" or was it prejudicial?*

Respondent argues that the testimony of the undercover agent "was merely cumulative of evidence properly admitted so that its introduction was harmless beyond any reasonable doubt." (R.O.B.[1] 4). In support of this con-

[1] Respondent's Opposing Brief

tention, respondent catalogues much trial testimony to the effect that petitioner said that she had loved Hayton as recently as a few weeks or month *before* the alleged murder. But this fact—that petitioner had loved Hayton sometime *before* the alleged murder—was not essentially disputed. Petitioner's theory at the trial was that there came a time shortly before the alleged murder when she *stopped* loving Hayton. (R. 873, 935, 1783-88). Thus, the critical and much disputed issue was: did petitioner still love Hayton *at the time of* the alleged murder? The State offered one—and only one—piece of evidence on this issue: the testimony of the undercover agent that petitioner had admitted *after the alleged murder* that "she had always loved Mr. Hayton and *still loves him* . . . ." (R. 1100-01, emphasis added). Respondent does not, because it could not, allege that this testimony—that petitioner loved Hayton *at the time of* the alleged murder—was "merely cumulative." To the contrary, it was the only prosecution evidence offered on this critical and disputed issue; and it cannot, on any fair reading of the record, be deemed harmless. (See P.[2] 22-24).

Respondent trots out an argument rejected by this Court on numerous occasions: that "Appellant's statements to the undercover agent were not confessions . . . but were instead *merely admissions* . . . , and that their introduction "was not prejudicial *under California law.*" (R.O.B. 16, emphasis added). But as petitioner has pointed out (P. 17 n.10), the statements held inadmissible in *Massiah* v. *United States*, 337 U.S. 201, and *Escobedo* v. *Illinois*, 378 U.S. 478, were also "merely admissions" rather than confessions. And, of course, any reliance on what would be "prejudicial under California law" is entirely misplaced, since this Court has recently held that the California rule, here applied, was unconstitutional. Respondent concedes that the District Court of Appeal "did not express the rule of

[2] Petition for Certiorari

harmless error beyond a reasonable doubt in these terms," as required by *Chapman v. California,* 35 U.S.L. Week 4197 (1967). It lamely asserts, however, that the District Court of Appeal's opinion "was a remarkable example of prescience in light of this Honorable Court's recent decision in *Chapman* . . . ." But any fair reading of the record requires the conclusion that the federal standard of harmless error was not applied and could not have been met here.

B) *Did counsel for petitioner waive her constitutional objection for strategic reasons?*

Respondent concedes that counsel for petitioner "had raised the [*Escobedo* and *Massiah*] point in chambers before the undercover agent was called as a witness." (R.O.B. 11). Respondent seems to argue, however, that the point was not adequately preserved because defense counsel did not renew the objection in open court after the preliminary questions had been asked, and because he made "no attempt to have the testimony of the undercover agent stricken." (R.O.B. 12). Respondent claims that this action was a "deliberately chosen" waiver, evidencing a strategic willingness "to have the undercover agent testify to show the extremes to which the sheriff went to try to convict her and to show that her story of innocence had never varied." (*Ibid.*) But as petitioner pointed out in her petition:

> "There is nothing in the record to support the view that [defense counsel] preferred to have Peggy Fisk's testimony admitted rather than excluded . . . . Indeed, if this were the case it would be extremely difficult to explain why he voiced his objection before her testimony. The most that can be said is that he may have preferred to have Peggy's testimony admitted rather

> than object in the presence of the jury after the preliminary questions."[3] (P. 12 n. 8)

Respondent appears to concede the unconstitutionality of any requirement that the objection must be renewed in the presence of the jury after the preliminary questions have been asked. Respondent claims, however, that

> "Under California law counsel for petitioner could have requested that the trial court take evidence outside of the presence of the jury on the issue of whether the statements made by petitioner to the undercover agent were voluntary and were not obtained in violation of petitioner's right to counsel." (R.O.B. 13)

But this is precisely what defense counsel attempted to do at the on-the-record proceeding in chambers. He objected to Peggy's testimony, but the trial judge ruled that "we would have to have her sworn and at least testify to the

[3] Petitioner further pointed out in her petition that "... the California requirement that counsel must renew his objection in the presence of the jury after the prosecution's preliminary questions had been asked and answered, forces defendants into an unconstitutional choice between foregoing their federal constitutional rights or making an objection which, if sustained, would inevitably leave in the jurors' minds the indelible impression that the suppressed evidence must have been damning indeed. The choice required of defense counsel by the California rule is particularly unfair in a case like the one at bar, where the unconstitutional testimony, though damaging to the defendant, is far less damaging than what the jury might imagine it to be. In this case, defense counsel would have had to make his objection in the presence of the jury after Peggy Fisk had stated that she had been petitioner's cellmate, that petitioner had made statements to her, and that she had never advised petitioner of her constitutional rights. A sustained objection at that point could not fail to leave the jury with the erroneous impression that petitioner had confessed to the crime. No legitimate state interest is served by requiring, in the context of a case like this, that an objection be renewed in the presence of the jury after preliminary questioning. See *Jackson* v. *Denno*, 378 U.S. 367, 378-88 (1964)." (P. 11-12).

preliminary questions anyway, and have an objection made at the proper time." (R. 1015). Petitioner's attorney disputed the judge's requirement that he must object in the presence of the jury, asserting: "You know that isn't right, Your Honor." But the Judge finally ruled that: "I don't see how it could be done *in the absence of the jury.*" (R. 1015, emphasis added). In light of this exchange, how can it be said that counsel for petitioner "made no such request" for a determination outside the hearing of the jury? What more could counsel do other than argue with the judge's ruling or futilely repeat his request? Accordingly, as petitioner has so clearly demonstrated (see P. 7-13), her conviction is reviewable by this Court.

C) *Were the statements testified to by the undercover agent elicited in a constitutional manner?*

Respondent has the temerity to argue that the "trick attempted by the authorities in which they apparently hoped to obtain incriminating statements from defendant and get her to throw herself on the alleged mercy of the sheriff and to suspect her own attorney" (53 Cal. Rptr. at 740) was entirely proper and not unconstitutional. It is difficult to believe that respondent is actually attempting to justify "the Peggy Fisk incident" as an entirely legitimate law enforcement technique under this Court's decision in *Lopez* v. *United States*, 373 U.S. 427.[4] Not even the California courts have attempted to justify this episode.

[4] Respondent cites *Lopez* v. *United States*, 373 U.S. 427, 438-39 for the following proposition: "It is well established that the authorities charged with law enforcement may place an agent in a cell so as to overhear incriminating statements on the part of an accused." There is not a single word in *Lopez* which lends any support to that proposition. The issue in that case concerned electronic recording; the conversation took place in an office, not a jail cell; and the defendant had not been arrested or charged with the crime at the time the recording was made.

Indeed, the District Court of Appeal condemned it in the clearest language as "completely indefensible," saying further that:

> "It is almost incredible that in these days of enlightened treatment by prosecution authorities of persons charged with crime, the Peggy Fisk incident could have occurred." (53 Cal. Rptr. at 738).

Nor does the opinion of the California District Court of Appeal support respondent's claim that "there was no process of interrogation undertaken by the undercover agent and the statements were entirely spontaneous on the part of [petitioner]." (R.O.B. 15). To the contrary, the District Court of Appeal found the following: 1) the agent "did not tell defendant she was a law enforcement agent"; 2) she was placed in petitioner's cell for "the purpose of conversing with defendant in the obvious hope that defendant would make some statement helpful to the prosecution"; 3) she "showed defendant a newspaper clipping concerning the case to indicate to defendant that the press was 'ruining her' "; 4) "Under instructions, Peggy told defendant that she had overheard a conversation in the hall between four men whom she thought were from the District Attorney's office, in which one of them said, 'Getting back to the Miller case, Arthwell Hayton came in and blew the top off the case' "; 5) "Peggy told defendant that she had talked to the sheriff and that they had discussed Peggy's getting 'a floater out of the State.' Peggy then said to defendant, 'I put all my trust in Mr. Bland [the sheriff] and maybe it would do some good for you if you tried the same.' Peggy indicated that she had mistrusted her own attorney and indicated that perhaps defendant should mistrust hers." (P. A27-A31). The District Court of Appeal then concluded that this "trick" was "com-

pletely indefensible'' under *Massiah, Dorado,* and *Escobedo.* Statements elicited as a result of such a week-long process can hardly be characterized ''entirely spontaneous'' (R.O.B. 15). They are the product of a carefully planned and executed process of subtle interrogation and trickery. The incredible fact that the highest law enforcement officer of this nation's largest state *still* regards this episode as proper and constitutional is adequate evidence that it must be authoritatively condemned by this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

October Term 1966
No. 1383

LUCILLE MILLER,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California.

RESPONDENT'S SUPPLEMENTAL OPPOSING BRIEF.

Introduction.

This respondent's supplemental opposing brief is submitted in response to the October 16, 1967, request of this Honorable Court that respondent file a further response in the above entitled case "as to when the agent obtained the statement of the accused in relation to the indictment, information or other charging process." The facts to follow are supported by the clerk's and reporter's transcript which are the part of the certified complete record on appeal which has been filed by petitioner and by certified copies of the records of the Municipal Court of San Bernardino Judicial District, County of San Bernardino, State of California, the originals of which are lodged with this court and

requested to be made a part of the record and copies of which are printed in this supplemental brief as Appendix A.

Statement of Facts.

Petitioner was arrested at about 1:30 p.m. on October 8, 1964, the day of the homicide. At that time she was advised of her rights in that she was told that she did not have to talk with the police if she did not want to; that she could remain silent and that she had a right to consult with an attorney before she talked with the police. She was brought to the county jail and booked. Afterwards she was permitted to talk with Mr. Ward, her attorney, for at least ten minutes. [Rep. Tr. pp. 1017-1019.]

On October 9, 1964, Peggy Fisk was booked into the county jail as a prisoner. However, she was employed by San Bernardino County to work undercover and to pretend to be a prisoner. While in the jail, she became acquainted with petitioner, as a result of which petitioner talked to her about herself, the reason for being in jail, her husband, and her domestic problems. Fisk did not tell petitioner that she was a law enforcement agent, but did tell her that she should discuss these things with her attorney. She did not tell petitioner that she had a right to have an attorney present when she talked to Fisk. Petitioner told Fisk that she and her husband had filed for divorce at one time but had reconciled before his death. She said that she had not loved her husband but that she had respected him. She said that she had always loved Mr. Hayton and still loved him. She said that as soon as this mess was over that she planned to take her daugh-

ter Debbie and the two boys away to Europe with the insurance money. She said that she would receive over $100,000 in insurance because of the accidental death. [Rep. Tr. pp. 1098-1101.] Fisk was not sure as to the date that she was released from the county jail but it was no later than October 15, 1964. She prepared her report as to her conversations with petitioner on October 12, 1964, and partly on October 14, 1964. [Rep. Tr. pp. 1103, 1108.] Fisk had been given instructions by Sheriff Bland of San Bernardino County only to listen to petitioner. [Rep. Tr. p. 1112.] The record is devoid of a single instance in which Fisk asked petitioner a question or said anything to her which induced any of the statements introduced into evidence.

On October 13, 1964, a complaint charging petitioner with murder was filed in the Municipal Court of San Bernardino Judicial District, County of San Bernardino, State of California. Petitioner was arraigned on that date and a preliminary hearing was set for October 23, 1964. (Appendix A.) On October 20, 1964, an indictment charging petitioner with murder was filed in the Superior Court of the State of California. [Clk. Tr. pp. 1-2.] On October 21, 1964, the complaint in the Municipal Court was dismissed. (Appendix A.) It therefore appears from the record that the statements made by appellant to the undercover agent preceded both the complaint in the municipal court and the indictment in the superior court.

ARGUMENT.

I.

No Substantial Federal Question Is Presented Under Petitioner's Contention That Statements Were Obtained in Violation of Her Constitutional Rights to Counsel and Against Self-Incrimination.

Petitioner has contended that she has established a substantial federal question based upon the introduction of statements made to the undercover agent which were introduced into evidence at her trial. She has contended that the statements were obtained in violation of the rules set forth in the case of *Massiah v. United States,* 377 U.S. 201 (1964), and the case of *Escobedo v. Illinois,* 378 U.S. 478 (1964). No substantial federal question is presented by petitioner because the record fails to establish that the undercover agent obtained statements from petitioner in violation of *Massiah* and *Escobedo.* For obvious tactical reasons petitioner intentionally waived the right to complain about the introduction of her statements when she did not object to the testimony. In any event, the testimony was merely cumulative of evidence already properly admitted so that its introduction was harmless beyond any reasonable doubt.

The case of *Massiah v. United States,* 377 U.S. 201, is not in point because that case dealt with a deprivation of counsel after arraignment where the accused had already been indicted when the statements were overheard. In the instant case the statements were made

without the slightest indication of a process of interrogation well before the indictment and before a complaint had been filed and before petitioner had appeared for arraignment in municipal court.

Massiah and *Escobedo* are likewise not in point because in both cases the statements obtained were held to have been the result of a process of interrogation. The record is devoid of any indication of a process of interrogation which resulted in petitioner's statements. In such a state of the record petitioner's contention is clearly subject to the rule that this honorable court will not review questions not clearly raised on the record. *Standard-Vacuum Oil Co. v. United States,* 339 U.S. 157, 160 (1949).

Petitioner's statements to the undercover agent were not confessions as defined in *People v. Speaks,* 156 Cal. App. 2d 25, 34; *People v. Ferdinand,* 194 Cal. 555, 568-569, but were instead merely admissions as defined in the last cited case. Petitioner's statements to the undercover agent were nothing more than a reiteration and a duplication of various statements already properly introduced into evidence and were therefore entirely cumulative. Under the circumstances there is no reasonable possibility that the admission of this cumulative evidence could have affected the verdict of the jury. The admission of the statements was therefore harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18.

Conclusion.

This concludes the further response to the petition in the instant case. Respondent believes that when the record is examined relevant to the matter complained of, and the Opinion of the California District Court of Appeal is considered, it will be concluded that no right guaranteed by the Constitution of the United States was violated, and that the judgment should stand. Accordingly, respondent submits the matter on the record heretofore presented to this Court, Respondent's opposing Brief, respondent's brief in the Court of Appeal and Answer to Petition for Hearing in the Supreme Court, the Opinion of the California District Court of Appeal, and the arguments set forth above, and requests that the relief asked by this petitioner be denied.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

PHILIP C. GRIFFIN,
Deputy Attorney General,
Attorneys for Respondent.

COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA

No. F 8754

THE PEOPLE OF THE STATE OF CALIFORNIA VS.

LUCILLE MARIE MILLER

DEPUTY DISTRICT ATTORNEY FOR PEOPLE

ATTORNEY FOR DEFENDANT

REPORTER

$

BAIL (CASH OR BOND) POSTED, DATE BY

DISPOSITION OF BAIL DATE

MUNICIPAL COURT SAN BERNARDINO COUNTY EUREKA SAN BERNARDINO JUDICIAL DISTRICT

DATE	
10-13-64	COMPLAINT FILED, Sworn to by WILLIAM PATERSON, Charging defendant with having on October 8, 1964, 19, at and in the County of San Bernardino, State of California committed a FELONY, to-wit: Murder (PC 187) Warrant of arrest issued and given to No. Bail Warrant issued to SO for service. Bail fixed at $ No. Bail
10-13-64	11:00 A.M DDA Turner for People, Atty Edward Foley of Holcomb Kassel & Ward with Deft. Atty states deft will not waive the informing of right. ~~Rmk~~ Deft arr and prel hear set for 10-23-64 at 9:15 AM. The deft's motion to admit deft to bail is denied. Atty Foley for the deft served Notice to the Dist Attorney and Asst DA Turner in open Court. Atty Foley serves notice to the Sheriff on Sheriff Bland in Open Court and gives copies to Court. JBL
10-21-64	Dismissal filed. Deft. indicted by Grand Jury on 10/20/64 for same offense.

I, RUDOLPH L. CORONA, Clerk and Administrative Officer of the Municipal Court, San Bernardino Judicial District, County of San Bernardino, State of California, hereby certify the foregoing instrument to be a full, true and correct copy of the original now on file in my office.

Dated October 18 1967

RUDOLPH L. CORONA, Clerk

By T. Jones Deputy

ORIGINAL

IN THE MUNICIPAL COURT OF SAN BERNARDINO JUDICIAL DISTRICT
COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. LUCILLE MARIE MILLER,

Bail, $ No Bail/ Want to $6

Defendant....

Complaint No. F 5 / 5 /

STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO, ss.

On the 13th day of October, 19 64, in the County of San Bernardino, State of California, personally appeared before me William Paterson who, being duly sworn, under oath complains and accuses LUCILLE MARIE MILLER

of the crime of MURDER (P.C. 187)

a felony committed as follows:

That said LUCILLE MARIE MILLER

on or about the 8th day of October, 19 64, ~~in San Bernardino Judicial District~~, in the County of San Bernardino, State of California, did unlawfully murder Gordon Eugene Miller, a human being.

FILED
OCT 13 1964
CLERK SUPERIOR COURT
BY ... DEPUTY

MUNICIPAL COURT SAN BERNARDINO COUNTY EUREKA SAN BERNARDINO JUDICIAL DISTRICT

I, RUDOLPH L. CORONA, Clerk and Administrative Officer of the Municipal Court, San Bernardino Judicial District, County of San Bernardino, State of California, hereby certify the foregoing instrument to be a full, true and correct copy of the original now on file in my office.

Dated October 8 1967

RUDOLPH L. CORONA, Clerk

By ... Deputy

Said complainant therefore prays that warrant may be issued for the arrest of said defendant.... and that ....he.... may be dealt with according to law.

William Paterson

Subscribed and sworn to before me this 13th day of October, 19 64

DAT:eb

J. B. LAWRENCE

Judge of the Municipal Court of San Bernardino Judicial District County of San Bernardino, State of California.

J. R. TRUSLER.
Clerk of the Municipal Court of San Bernardino Judicial District County of San Bernardino, State of California.

By ... Deputy

PA 1432—10M-12-39 SBMC

MUNICIPAL COURT OF SAN BERNARDINO JUDICIAL DISTRICT

F 8754

HON. J. B. LAWRENCE, JUDGE VIVIAN G. JONES, COURT CLERK;

AND THE FOLLOWING PROCEEDINGS WERE HAD:

F. 8754 PEOPLE vs. LUCILLE MARIE MILLER

CHARGE: MURDER (P.C. 187)

Defendant is present in court

Defendant gives true name as charged

Defendant duly arraigned and informed of all legal rights

~~Attorney and defendant duly waives arraignment and informing of legal rights~~

Defendant will Hire Attorney ~~Court appoints Attorney~~

Preliminary hearing set for 10/23/64 @ 9 A.M.

The defendant's Motion to admit to bail is denied

I CERTIFY THAT THE FOREGOING MINUTES ARE CORRECT

AND WERE ENTERED ON OCT 13 1964 DAY OF ....., 19.....

Court Clerk

DIVISION B DATE:

I, RUDOLPH L. CORONA, Clerk and Administrative Officer of the Municipal Court, San Bernardino Judicial District, County of San Bernardino, State of California, hereby certify the foregoing instrument to be a full, true and correct copy of the original now on file in my office.

Dated October 15 1967

RUDOLPH L. CORONA, Clerk

By ..... Deputy

MUNICIPAL COURT SAN BERNARDINO COUNTY EUREKA SAN BERNARDINO JUDICIAL DISTRICT

Form Engraved by Starts — L 66 — 1875 — 193

MUNICIPAL COURT OF SAN BERNARDINO JUDICIAL DISTRICT

F 8754

F 8754 Peo. Vs. LUCILLE MARIE MILLER

Charge: MURDER (P.C. 187)

DIV. B CONVENED AT 11:10 A M:

HON. J. B. LAWRENCE JUDGE; A. SPIOTTO COURT CLERK

DEP. DIST ATTY. Don Turner ; DEFENDANT with

COURT REPORTER — ; King BAILIFF

THE FOLLOWING PROCEEDINGS WERE HAD:

On motion DDA Turner case dismissed in view fact deft inducted by Grand Jury. Release Issued

I CERTIFY THAT THE FOREGOING MINUTES ARE CORRECT

AND WERE ENTERED ON 21 DAY OF October 1964

A Spiotto
Court Clerk

Page 1 of 1 pages. DIVISION B DATE: OCT 21 1964

MUNICIPAL COURT SAN BERNARDINO COUNTY CALIFORNIA SAN BERNARDINO JUDICIAL DISTRICT

I, RUDOLPH L. CORONA, Clerk and Administrative Officer of the Municipal Court, San Bernardino Judicial District, County of San Bernardino, State of California, hereby certify the foregoing instrument to be a full, true and correct copy of the original now on file in my office.

Dated October 18 1967

RUDOLPH L. CORONA, Clerk

By V. Lewis Deputy

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In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. 154

LUCILLE MILLER,
PETITIONER,

v.

STATE OF CALIFORNIA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA DISTRICT COURT OF APPEAL

PETITIONER'S MEMORANDUM IN RESPONSE TO RESPONDENT'S SUPPLEMENTAL OPPOSING BRIEF

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Blanchard Press, Inc., Boston, Mass. — Law Printers

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 154

LUCILLE MILLER,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA DISTRICT COURT OF APPEAL

PETITIONER'S MEMORANDUM IN RESPONSE TO RESPONDENT'S SUPPLEMENTAL OPPOSING BRIEF

We are in receipt of Respondent's Supplemental Opposing Brief in the above titled case which asserts on page 3 that: "It therefore appears from the record that the statements made by appellant to the undercover agent preceded both the complaint in the municipal court and the indict-

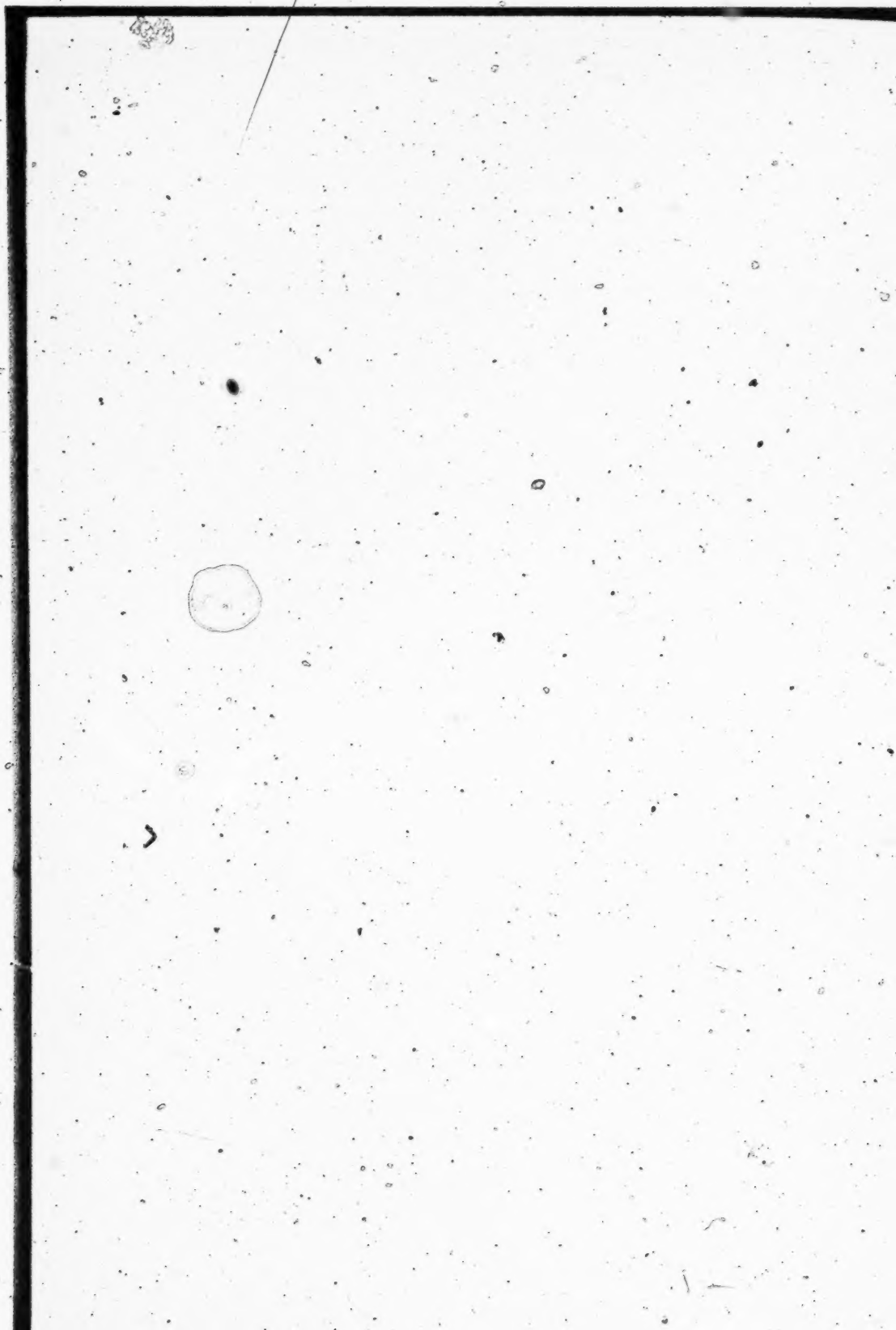
ment in the superior court." This conclusion is not supported by respondent's own version of the facts. In the preceding paragraph, respondent points out that Peggy Fisk "prepared her report as to her conversations with petitioner on October 12, 1964 and partly on October 14, 1964." Petitioner was arraigned and complained against on October 13, 1964. This chronology strongly suggests that statements were obtained *after* the arraignment and complaint. Surely, the burden ought to be on the State to show—not simply speculate—that no statements were made after that time.* In any event, the State does not challenge petitioner's assertion that the statements were obtained after petitioner was arrested, booked and taken into custody.

Respectfully submitted,

F. Lee Bailey, Esq.
40 Court Street
Boston, Massachusetts 02108
Counsel for Petitioner

---

* Nor is there any record support for respondent's suggestion that Peggy Fisk never asked petitioner any questions or said anything to her which induced any of the statements introduced into evidence. Not only does this suggestion defy common sense; it was also explicitly rejected by the District Court of Appeals which found that Peggy had been "placed in a cell with defendant for the purpose of conversing with defendant in the obvious hope that defendant would make some statement helpful to the prosecution." Petitioner's appendix, p. A-27.



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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1967

No. 154

LUCILLE MILLER,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT

BRIEF OF THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 154

LUCILLE MILLER,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

BRIEF OF THE PETITIONER

Citations to Opinions Below

The judgment of the Supreme Court of California, denying hearing, is not reported and appears as a minute order in the Court's records (Minute Order in Case No. 2512).

The opinion of the District Court of Appeal is reported at 53 Cal. Rptr. 720 (also 245 A.C.A. 111).

Jurisdiction

The California District Court of Appeal, Fourth Circuit, Division 1, affirmed petitioner's first degree murder conviction on September 22, 1956 (rehearing denied on October 20, 1966). The California Supreme Court declined review on December 14, 1966, thereby affirming the judgment of conviction. Mr. Justice Douglas granted an extension of time, until May 13, 1967, within which to file the petition for a writ of certiorari. This Court granted certiorari on December 4, 1967, limited to questions I and II raised in the petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

The questions presented here were raised at the trial by an objection made outside the hearing of the jury in an on-the-record proceeding (see trial transcript pp. 1007-15); they were raised in both appeals and considered in detail by the District Court of Appeal, see, 53 Cal. Rptr. at 738-740. This Court's power to review the judgment was discussed at length in the petition for certiorari at pages 7-13, to which the Court is respectfully referred.

Constitutional Provisions

The constitutional provisions involved are the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. They are printed in 1 U.S.C. XLVI.

Questions Presented

I. Whether the introduction of admissions made to an undercover agent planted in petitioner's jail cell constituted a violation of petitioner's constitutional rights to counsel and against self-incrimination.

II. Whether inculpatory admissions, obtained under circumstances like those here involved, can ever constitute harmless error.

Statement

a. *The Discovery of the Alleged Crime*

About 1:45 a.m. on October 8, 1961, petitioner, Mrs. Lucille Miller, arrived at the home of Mrs. Maurice Swenson in Alta Loma, California, saying that her husband Dr. Gordon Miller was trapped inside a burning car. Mrs. Swenson called the sheriff's office and, at Mrs. Miller's request, also called Harold J. Lance, a close friend of the Millers and their family attorney (R. 63-70).[1] When Lance and a fire company arrived at the Swenson home, Mrs. Miller led them back to the burning Volkswagen. After some time the fire was extinguished; Dr. Miller was dead (R. 86-90). Lance then drove petitioner home, but they returned to the scene at about 3:00 a.m. (R. 128-31), where she told the police officer present that she had been driving with her husband when she lost control of the car which ran up on the side of the road. She said that she must have been dazed and that the next thing she knew, flames were springing up behind her. In panic, she jumped out of the car and ran around to the other side to pull her

[1] R. refers to the official transcript of the trial record.

husband out, but his door was locked. She tried, but failed, to open the door, and after realizing that she could do nothing more, she went to the Swenson home to get help (R. 365-70).

b. *The Arrest, Booking, and Initial Interrogation*

At 1:50 p.m. on October 9, three deputy sheriffs entered Mrs. Miller's home and placed her under arrest for murder (R. 60, 1017). She was taken to the San Bernardino County jail where she was met by her attorney and "booked" for murder (R. 1018). At 9 a.m. she was taken from her cell and questioned for several hours.[2]

c. *The Undercover Agent in Petitioner's Jail Cell*

At about 11 p.m. on October 9, Peggy Fisk, an undercover agent in the employ of the Sheriff's office, was falsely "booked" on a narcotics violation and placed in petitioner's cell (R. 1103). Shortly thereafter, the two other prisoners who had been sharing the cell with petitioner were removed so that Miss Fisk could be alone with petitioner in the cell (R. 1107-08). Miss Fisk remained alone in the cell with petitioner for 7 days, until Oct. 15. During that period, petitioner had a number of retained lawyers who remained on duty outside her cell 24 hours a day in order to assure that the authorities would respect her privilege against self-incrimination (R. 2319). Petitioner, of course, did not have counsel inside the cell. Nor did she think she needed one there, for Miss Fisk never told petitioner

[2] A tape of this interrogation was introduced at petitioner's trial. During this interrogation, petitioner repeated the story she told the police the previous night. She admitted that she had been involved in an affair with a Mr. Hayton but claimed that the affair had ended in August (R. 1017-25, 1079-90).

that she was a police agent rather than a real prisoner, or that petitioner had right to remain silent and have an attorney present at all their "discussions." On October 13, during the period that Miss Fisk was in the cell, a complaint charging petitioner with murder was filed in the Municipal Court, and petitioner was arraigned on that date.[3] Miss Fisk remained in the cell and continued to obtain incriminating statements even after petitioner had been formally charged and arraigned.

d. *The Trial*

Petitioner's second trial commenced on January 11, 1965.[4] The state's theory was that the fire that killed Dr. Miller was of incendiary, rather than accidental, origin (R. 244-62); that petitioner was infatuated with Mr. Hayton and did not love her husband (R. 4-12, 1258, 2015-19) and that petitioner therefore started the fire to be rid of her husband so that she could marry Hayton and collect the $100,000 insurance of which she was the beneficiary in the event of her husband's accidental death. The defense theory was that the fire was of accidental rather than incendiary origin (R. 1567-78, 1805-13); that although petitioner had been infatuated with Mr. Hayton, the affair was over several months before Dr. Miller's death (R. 874, 935, 1783-88); that petitioner was reconciled with her husband at the time of his death; and that petitioner would not be motivated

[3] The judge issued an order prohibiting officials from questioning petitioner unless her attorney was present. He also ordered petitioner's attorneys to stop sitting outside the cell. The prosecutor violated the order by keeping Miss Fisk in the cell with petitioner until October 15.

[4] Her first trial ended after several days of jury selection in a mistrial declared by the judge because of highly prejudicial publicity appearing in the local press (R. 3).

to kill a successful $30,000 a year dentist in order to collect a mere $100,000 in insurance.

As these conflicting theories were unfolding, Peggy Fisk was called as a government witness. Petitioner's counsel objected to permitting Miss Fisk to testify, on the ground, among others, that such testimony would violate "the rule in *Messich* (sic) versus the *United States*." (See petition for certiorari at pp. 7-13.) Peggy Fisk testified that petitioner had admitted to her that "she did not love her husband"; that "she always loved Mr. Hayton and still did"; and that she was planning to go to Europe with the $100,000 in insurance (R. 1100-01). The prosecutor relied heavily on Miss Fisk's testimony during the course of the trial and in his closing remarks to the jury (R. 1258-59, 2019, 2061-62, 2318-20).

The jury deliberated for more than three days before returning a verdict of guilty of murder in the first degree (R. 2376, 2441).

Summary of Argument

I. This Court's prior decisions establish the unconstitutionality of planting an undercover agent in the jail cell of an unsuspecting defendant for purposes of eliciting incriminating statements. Indeed, the Attorney General seems to concede the unconstitutionality of this practice. He argues, however, that the statements at issue here were "spontaneous remarks" unconnected with the conduct of the undercover agent. This argument is conclusively rebutted by the record and the opinion of the lower court, both of which establish beyond any doubt that the statements were intentionally elicited by a series of leading questions carefully designed by the police and executed by the agent.

II. This Court has held, in an unbroken line of cases beginning in 1897 and reaffirmed in recent years, that the introduction into evidence of unconstitutionally obtained out of court statements automatically requires reversal. No legitimate purposes would be served by extending the harmless-error rule to this category of cases. Indeed, extending that rule to the type of two-stage intentional error involved here would only serve to encourage some prosecutors to take unsavory gambles by introducing unconstitutionally obtained statements which they regard as potentially helpful to their case, but which they believe an appellate court may, on a cold record, regard as harmless. Nor should the Court now resurrect the discredited distinctions between confessions and admissions or between inculpatory and exculpatory statements.

ARGUMENT

I.

The Introduction of Admissions Made to an Undercover Agent Planted in Petitioner's Jail Cell Constituted a Violation of Petitioner's Constitutional Rights to Counsel and Against Self-Incrimination.

There can be no dispute about the unconstitutionality of the manner in which Peggy Fisk obtained petitioner's admissions. The California District Court of Appeals expressed no doubt about that in describing the events surrounding the admissions:

> It is almost incredible that in these days of enlightened treatment by prosecution authorities of persons charged with crime, the Peggy Fisk incident could

> have occurred. Peggy was an undercover agent, working in narcotics and employed by the sheriff. She was falsely booked in the jail as a narcotics violator and placed in a cell with defendant in the obvious hope that defendant would make some statement helpful to the prosecution. 53 Cal. Rptr. at 738.

The lower court also observed that:

> Peggy told defendant that she had talked to the sheriff and that they had discussed Peggy's getting "a floater out of the State." Peggy then said to defendant, "I put all my trust in Mr. Bland [the sheriff] and maybe it would do some good for you if you tried the same." Peggy indicated that she had mistrusted her own attorney and indicated that perhaps defendant should mistrust hers. *Id.* at 739.

The Court then concluded that:

> "The trick attempted by the authorities in which they apparently hoped to obtain incriminating statements from defendant and to get her to throw herself on the alleged mercy of the sheriff and to suspect her own attorney was completely indefensible, . . . We have in mind *Massiah* v. *United States*, 377 U.S. 201 . . . and *Escobedo* v. *State of Illinois*, 378 U.S. 478 . . . " 53 Cal. Rptr. at 740.

It would be difficult to imagine a more blatant violation of petitioner's federal constitutional right to counsel and against self-incrimination under *Massiah* and *Escobedo*, *supra*. And it is clear that the California District Court of Appeals would have reversed petitioner's conviction under those decisions if it had not entertained the erro-

neous beliefs that petitioner's counsel had not properly objected to Peggy Fisk's testimony (see Petition for Certiorari pp. 5-13) and that petitioner was not sufficiently prejudiced by the testimony (see *infra* pp. 31-33, conclusion and suggested disposition).

In *Massiah* v. *United States*, 377 U.S. 201 (1964) this Court held the "petitioner was denied the basic protection of the guarantee [of the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206. In *Massiah*, as here, petitioner did not make a specific request to consult with his previously retained counsel, since he was unaware that he was being questioned by someone working for the government. This did not preclude reversal of *Massiah's* conviction, because as the Court noted (quoting from Judge Hays' dissent in the Court of Appeals, 307 F. 2d at 72-3):

> "if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent." 377 U.S. at 206.

Accordingly, there are only two differences between the *Massiah* case and the one at bar: 1) *Massiah* was a federal and this is a state case; and 2) The "indirect and surreptitious interrogation" in *Massiah* occurred after the defendant had been indicted and released on bail; while the "indirect and surreptitious interrogation" here occurred after petitioner was arrested and booked for murder and while

she was in jail awaiting indictment (and some of it even continued after she had been formally charged and arraigned). Petitioner will show, however, that this Court has held, in two cases decided before petitioner's trial began, that these differences are without significance.

In *McLeod* v. *Ohio*, 378 U.S. 582, decided on June 22, 1964, this Court held the rule announced in *Massiah* applicable to the states.[5] Consequently, the first of the above mentioned differences between *Massiah* and this case is without significance. In *Escobedo* v. *Illinois*, 378 U.S. 478, decided on June 22, 1964, the interrogation was conducted after defendant was arrested but before he had been indicted. The Court extended the *Massiah* rule to such interrogations, observing that:

> "It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." 378 U.S. at 486.

Petitioner's trial began on January 11, 1965. At that time, therefore, this Court had announced the following rules:

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[5] In that decision, the Court remanded to the Supreme Court of Ohio for reconsideration in light of *Massiah* v. *United States*, 377 U.S. 201, thereby deciding that the *Massiah* rule applied to the states, but affording the Ohio court an opportunity to decide whether the facts in that case were governed by *Massiah*. When the Ohio Supreme Court affirmed the conviction, the Supreme Court reversed, citing *Massiah*, 381 U.S. 356 (1965).

1) Indirect and surreptitious questioning of a federal defendant by a government agent after he had been indicted and retained counsel violated his rights under the Sixth Amendment. *Massiah* v. *United States, supra.*

2) When the interrogation was indirect and surreptitious, no request to consult counsel need be made. *Massiah* v. *United States, supra.*

3) These rules apply to the states through the Fourteenth Amendment. *McLeod* v. *Ohio, supra.*

4) These rights do not depend, in cases where the defendant has been arrested and booked, on whether "the authorities had secured a formal indictment." *Escobedo* v. *Illinois.*[6]

These rules—and the decisions which embodied them—squarely cover the admissions made to Peggy Fisk in this case. The nature of the undercover activity was identical with that in *Massiah* (surreptitious questioning by a government agent), and the stage in the process was identical with that in *Escobedo* (defendant had been arrested, booked, and had retained counsel).[7] Consequently, those cases (combined with *McLeod* which applies *Massiah* to

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[6] The Court, in *Massiah* and *Escobedo* had also applied the rules to admissions as well as confessions; indeed in both of those cases, the incriminating statements were admissions rather than confessions. In *Miranda* v. *Arizona,* 384 U.S. 436 (1966) the Court extended these rules to exculpatory as well as inculpatory admissions, 384 U.S. at 444. Petitioner does not, however, place any reliance on *Miranda,* since the challenged statement here was the sort of inculpatory admission clearly covered by *Massiah* and *Escobedo.*

[7] Indeed, in this case, the improper police conduct continued even after petitioner had been formally charged and arraigned.

the states) require the conclusion that the manner in which Peggy Fisk obtained petitioner's admissions constituted a violation of petitioner's federal constitutional rights.[8]

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[8] *Miranda* v. *Arizona*, 384 U.S. 436 (1966), decided after petitioner's trial, added nothing to the cases decided before her trial which is relevant to the circumstances of this case; consequently, the rule announced by this Court in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) does not bar reversal of petitioner's conviction. *Miranda* added the following major elements to *Massiah* and *Escobedo*:

1) In *Escobedo* the defendant had requested an opportunity to consult with counsel. In *Miranda*, the Court held that "[a]n individual need not make a pre-interrogation request for a lawyer." 384 U.S. at 470. Instead he "must be clearly informed that he has the right to consult with a lawyer. . . ." *Id.* at 471.

But this did not change the law in cases like the one at bar, since it already had been held in *Massiah*, that a defendant who, like petitioner, was the victim of "indirect and surreptitious interrogation" need not have made a request for a lawyer, "because he did not even know that he was under interrogation by a government agent." *Massiah* v. *United States*, *supra* at 206.

2) In *Escobedo*, the defendant had retained a lawyer. In *Miranda*, the Court held that if a defendant is indigent, he had the right to have a lawyer appointed to represent him. 384 U.S. at 472-3.

But petitioner here was not indigent. She had already retained counsel. Accordingly, *Miranda* did not change the law as it applied to her. All the law she needed to establish the unconstitutionality of the challenged practice was announced prior to her trial. Accordingly, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), requires that this law be applied to her case; and an application of *Massiah* and *Escobedo* to this case requires the conclusion that petitioner's constitutional rights were violated by the introduction of evidence secured in the manner in which Peggy Fisk's testimony was obtained.

Even if this Court were to disagree with petitioner's contention that *Massiah* and *Escobedo* establish the unconstitutionality of Peggy Fisk's testimony, *Johnson* v. *New Jersey* would still be inapplicable. If *Massiah* and *Escobedo* do not establish the unconstitutionality of Peggy Fisk's testimony, then the facts of this case present a new and undecided issue requiring resolution by this Court. In that event, the Court should announce its resolution of the issue, and apply that resolution to petitioner in this case, see *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967), citing Article III of the Constitution.

The Attorney General of California seems to concede that the conduct of the sheriff was unconstitutional. In a letter to the Clerk of this Court, dated July 10, 1967, he made the following statement:

> "Respondent did not argue and does not now advocate that the conduct of the sheriff and the undercover agent as set out at page 6 of Petitioner's Reply Brief was proper and not unconstitutional. Respondent hereby goes on record as condemning such conduct."

He goes on however, to make the incredible argument that petitioner's admissions were "spontaneous remarks" that had no connection with the conduct of the undercover agent.[9] The Attorney General is thus attempting to paint a portrait of a government agent passively sitting by and simply listening to the spontaneous remarks of the prime suspect in an important murder case.[10]

This fictional portrait not only defies common sense; it also flies directly in the face of the undisputed testimony of the undercover agent herself and of the findings of the California District Court of Appeal.

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[9] Our point is that on the record in this case there is no showing that the conduct of the undercover agent had any connection with petitioner's voluntary and spontaneous remarks. . . . " *Id.* at p. 1-2.

[10] Indeed, at one point the state tried to argue that Peggy Fisk was not only a passive listener, but even a reluctant one:

> "She stayed up in the jail with her for about a week and listened and when Mrs. Miller would talk to her, on two or three occasions, she told her 'Don't tell me about it,' but Mrs. Miller insisted on telling her. It is Mrs. Miller's right and privilege to talk, if she wants to." (Respondent's opposing brief on Certiorari at p. 10, quoting Rep. Tr. pp. 1010-1012.)

This is quite a contrast to what the prosecutor told the jury in his summation: "Everything that ingenuity could conceive was done to try to find out what happened. . . . " (R. 2320).

The record in this case clearly reveals that Peggy Fisk was not, in any sense, a passive auditor of petitioner's spontaneous statements. Miss Fisk's own testimony conclusively establishes that she induced petitioner, by carefully prepared and cleverly executed leading questions, to discuss the crime and make the statements in issue. Miss Fisk admitted that she began one "discussion" by telling petitioner that she had just overheard a conversation between four men from the District Attorney's Office in which one had said "Getting back to the Miller case, Arthwell Hayton came in and blew the top off the case" (R. 1107). Miss Fisk also testified that she was instructed to begin the discussion with this deliberate lie (R. 1107). This episode which is strikingly similar to those condemned by the Court in *Escobedo, supra,* and *Bram* v. *United States,* 168 U.S. 532 (1897), hardly fits the prosecutor's picture of a passive listener. Miss Fisk also testified that she began another discussion by showing petitioner a newspaper clipping which the police had supplied her and "possibly" said something about how the press was ruining her (R. 1104-05). The "conversation" continued with "passive" Peggy telling petitioner that she once had an attorney "which did not do me much good," and that petitioner should "think about it because maybe this would happen to her." She then told petitioner that she had spoken to Frank Bland (the sheriff) about the possibility of his dropping the charges against her (Peggy) and arranging "a floater out of the state," and said that "I put all my trust in Mr. Bland and maybe it would do some good for you if you tried the same" (R. 1106). Again, this outrageous and overt attempt to get the defendant to distrust her own lawyer hardly fits the passive picture the prosecutor is trying to paint. Miss Fisk testified further that she told petitioner that her own father

had burned to death much like the victim in this case (R. 1106). Such leading statements surely must have provoked discussion of the crime with which petitioner was charged.

Moreover, if Peggy Fisk's only job was to listen rather than to induce discussion, as the State claims, then why was it necessary to clear the cell of all persons other than petitioner and Miss Fisk? It is undisputed that when Miss Fisk first entered the cell, two other girls were present. Shortly thereafter, the other two were removed from the cell and Peggy and petitioner were left alone for the remainder of the seven days (R. 1107-08). These undisputed facts make it impossible to conclude that petitioner's statements were entirely "spontaneous" and in no way connected to the concededly unconstitutional conduct of the undercover agent.

In any event, the California District Court of Appeal explicitly rejected any notion that Peggy Fisk was merely a passive listener. It found that by placing her in the cell, the authorities "hoped to obtain incriminating statements from defendant and to *get her* [not a very "passive" phrase] to throw herself on the alleged mercy of the sheriff and to suspect her own attorney" (A. at 31, emphasis added). That Court also explicitly found that Peggy was placed in the cell "for the purpose of *conversing with* defendant in the obvious hope that defendant would make some statement helpful to the prosecution" (A. at 27, emphasis added).

The State argues however, that petitioner's admissions were not the result of "a process of interrogation," and that this case is therefore distinguishable from *Massiah* v.

United States, supra.[11] Ironically, that very argument was made and rejected in *Massiah* itself. In that case, the Solicitor General argued that:

> "Agent Murphy's testimony indicates that Colson did not coerce petitioner into making any incriminating statements or even induce him by appeals to talk in the guise of friendship. The recording of the entire conversation confirms this. *Petitioner talked freely* to Colson concerning their joint narcotics activities. Petitioner obviously did so because he believed that Colson was still his confederate and that they were facing criminal prosecution together. We submit that the *government may properly give a defendant the opportunity to make incriminating statements, where the only deception is that he believes his remarks are private.* When the defendant makes the incriminating statements freely, *i.e.*, without coercion or improper inducement, there is no reason why such relevant evidence should be excluded at trial." Brief for the United States in *Massiah* v. *United States,* at pp. 27-28 (emphasis added).

Indeed, a reading of the record in *Massiah* suggests that there was, if anything, less inducement there than in the case at bar. See Record in *Massiah* at 79-98.[12]

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[11] Respondent's opposing brief on Certiorari at 15: "The *Massiah* and *Escobedo* cases are not in point, because in both cases the statements were held to have been the result of a process of interrogation."

[12] This would seem to confirm the interpretation given *Massiah* by commentators and lower courts that "The real issue presented in *Massiah* is whether law-enforcement officials may seek evidence from an accused's own mouth when the accused does not realize that he is talking to such officials and is providing them with evidence

It is interesting to note, moreover, that the Solicitor General, in his brief in *Massiah*, specifically addressed himself to the precise situation involved in this case: "the admission of statements obtained through a jail-cell 'plant' . . . " *id.* at 32. He regarded this type of case as "more difficult than [*Massiah*] since the government had custody of the defendant and controlled his movements. [Whereas in *Massiah*], petitioner freely decided to enter Colson's automobile and talk to him." [13] We agree with the Solicitor General that if the police practice in *Massiah* was unconstitutional, then the police practice in this case, where the defendant was confined in a jail cell, is *a fortiori*, unconstitutional.

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that will help convict him" Enker and Elsen, Counsel for the Suspect: *Massiah* v. *United States* and *Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47, 57 (1964). This harks back to an early formulation of the function of the privilege: "[T]he law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824) (Emphasis added). Cf. *Paroutian* v. *United States*, 370 F. 2d 631 (2d Cir. 1967), cert. denied, 387 U.S. 943 (1967); *Stovers* v. *United States*, 361 F. 2d 301 (9th Cir. 1965).

[13] Petitioner in *Massiah* relied heavily on the case of *People* v. *Robinson*, 16 App. Div. 2d 184, 224 N.Y.S. 2d 705 (4th Dept. 1962) in which the New York Appellate Division had required the exclusion of a statement elicited from a confined suspect by an undercover police agent. The Solicitor General said that the "Robinson case involved a jail-cell 'plant,' which, as we have noted, is also a more difficult case than the one before the Court." Solicitor General's Brief at 31-32 note 13. In light of this exchange, the Court's citation with approval of the *Robinson* case in *Massiah*, takes on particular significance. *Massiah* v. *United States*, *supra* at 205.

II.

This Court Should Not Extend the Harmless Error Rule to the Intentional Introduction of a Defendant's Out of Court Statement Obtained by Unconstitutional Police Behavior.

Until recently, it had been widely assumed that "the commission of any constitutional error at . . . a criminal trial should require automatic reversal." [14] There was much support for this view in the decisions of this Court. "[I]n a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that Constitutional violations might be disregarded on the ground that they were 'harmless.'" [15] But in *Chapman* v. *California*,

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[14] Note, Harmless Constitutional Error, 20 Stanford Law Review 83, 84 (1967).

[15] *Chapman* v. *California*, 386 U.S. 18, 43 (Stewart, *J.*, concurring). Mr. Justice Stewart stated that illustrations of this principle "are legion" and offered the following in support of his statement:

"When involuntary confessions have been introduced at trial, the Court has always reversed convictions regardless of other evidence of guilt. As we stated in *Lynumn* v. *Illinois*, 372 U.S. 528, 537, the argument that the error in admitting such a confession 'was a harmless one . . . is an impermissible doctrine.' That conclusion has been accorded consistent recognition by this Court. *Malinski* v. *New York*, 324 U.S. 401, 404; *Payne* v. *Arkansas*, 356 U.S. 560, 568; *Spano* v. *New York*, 360 U.S. 315, 324; *Haynes* v. *Washington*, 373 U.S. 503, 518-519; *Jackson* v. *Denno*, 378 U.S. 368, 376-377. Even when the confession is completely 'unnecessary' to the conviction, the defendant is entitled to a new trial 'free of constitutional infirmity.' *Haynes* v. *Washington*, *supra*, 518-519.

"When a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' *Glasser*

386 U.S. 18 (1967) the Court held "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 22. In so holding the Court did not intend to extend the harmless error rule to every type of constitutional error. Indeed, it reaffirmed the holding of its prior cases, that there are some constitutional rights so basic to a fair trial that their infraction can never be

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v. *United States*, 315 U.S. 60, 76. That, indeed, was the whole point of *Gideon* v. *Wainwright*, 372 U.S. 335, overruling *Betts* v. *Brady*, 316 U.S. 455. Even before trial, when counsel has not been provided at a critical stage, 'we do not stop to determine whether prejudice resulted.' *Hamilton* v. *Alabama*, 368 U.S. 52, 55; *White* v. *Maryland*, 373 U.S. 59, 60.

"A conviction must be reversed if the trial judge's remuneration is based on a scheme giving him a financial interest in the result, even if no particular prejudice is shown and even if the defendant was clearly guilty. *Tumey* v. *Ohio*, 273 U.S. 510, 535. To try a defendant in a community that has been exposed to publicity highly adverse to the defendant is *per se* ground for reversal of his conviction; no showing need be made that the jurors were in fact prejudiced against him. *Sheppard* v. *Maxwell*, 384 U.S. 333, 351-352; cf. *Rideau* v. *Louisiana*, 373 U.S. 723, 727. See also *Estes* v. *Texas*, 381 U.S. 532, 542-544, 562-564 (Warren, *C.J.*, concurring), 593-594 (Harlan, *J.*, concurring).

"When a jury is instructed in an unconstitutional presumption, the conviction must be overturned, though there was ample evidence apart from the presumption to sustain the verdict. *Bollenbach* v. *United States*, 326 U.S. 607, 614-615. Reversal is required when a conviction may have been rested on a constitutionally impermissible ground, despite the fact that there was a valid alternative ground on which the conviction could have been sustained. *Stromberg* v. *California*, 283 U.S. 359, 367-368; *Williams* v. *North Carolina*, 317 U.S. 287, 292. In a long line of cases leading up to and including *Whitus* v. *Georgia*, 385 U.S. 545, it has never been suggested that reversal of convictions because of purposeful discrimination in the selection of grand and petit jurors turns on any showing of prejudice to the defendant." *Id.* at 42-44 (footnotes omitted).

treated as harmless error." *Id.* at 23.[16] As an example of such a right, the Court cited "*Payne* v. *Alabama*, 356 U.S. 560 (coerced confession)." *Id.* at 23, note 8.

This Court should not now extend the harmless error rule to the type of constitutional error involved in this case —the intentional introduction of a defendant's out of court statement obtained by unconstitutional behavior—for the following reasons:

(A) Such an extension would necessitate the overruling of a long and uninterrupted line of cases dating back to 1897 and reaffirmed in recent years.

(B) It would commit the Court to the time-consuming and purposeless job of distinguishing, on a case by case basis, among various kinds of out of court statements (confessions v. admissions, inculpatory v. exculpatory statements) just at a time when it has rejected these distinctions in a related context.

(C) It would place the Court in the unseemly position of giving "final effect to a judgment tainted with [particularly reprehensible] intentional misconduct." See *Chapman* v. *California*, *supra* at pp. 18-19 (Harlan, *J.* dissenting).

(D) It would encourage some prosecutors to take unsavory gambles by introducing unconstitutionally obtained statements which they regard as potentially helpful to their case, but which they believe an appellate court may, on a cold record, regard as harmless.

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[16] In its concluding paragraph, the Court also said that the error in that case "can no more be considered harmless than the introduction against a defendant of a coerced confession. See, *e.g.*, *Payne* v. *Arkansas*, 356 U.S. 560", thus explicitly reaffirming its prior holdings that the introduction of a coerced confession always requires reversal. See discussion *infra*.

(E) And it would serve none of the salutary purposes advanced in support of the harmless error rule in other contexts.

A. Extending the Harmless Error Rule to This Type of Case Would Necessitate the Overruling of a Line of Cases Dating Back to 1897 and Reaffirmed in Recent Years.

The first case in which this Court explicitly considered the possibility of a harmless error rule in the context of a constitutional error was *Bram* v. *United States*, 168 U.S. 532 (1897). That case is remarkably similar to the one at bar, both in its facts and in the argument made by the prosecution. In *Bram*, the defendant had made an exculpatory statement after being told by a detective that another suspect had incriminated him.[17] This statement was then introduced by the government as an admission against interest.[18] The prosecution argued there, as it does here,

[17] The testimony about Bram's statement was as follows: "When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown.' 'But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murdered; but I don't know anything about it.' He was rather short in his replies." 168 U.S. at 539.

[18] It is clear that the statement was not technically a confession, for it was not "an acknowledgment in express words, by the accused . . . of the truth of the guilty fact charged or of some essential part of it." 3 Wigmore, Treatise on Evidence §21 at p. 238. Nonetheless, the Court sometimes referred to it as a "confession." See *Id.* at 541. That it was not using "confession" in its technical sense is amply

that the statement was not prejudicial because it was exculpatory.[19] The Court specifically rejected that argument in language broad enough to require automatic reversal in every case where an unconstitutionally induced out of court statement—whether confession or admission, inculpatory or exculpatory—is introduced by the prosecution. The Court said:

> If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt. *Id.* at 541.

The Court went on to make its position crystal clear by quoting with approval from a leading state case as follows:

> "The contradiction involved in the assertion that the statement of an accused tended to prove guilt, and therefore was admissible, and then after procuring its admission claiming that it did not tend to prove guilt, and could not, therefore, have been prejudicial,

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demonstrated by its statement that "we are not concerned with how far the confession tended to prove guilt." *Ibid.* The Court also quoted with approval the following statement from section 219 of Greenleaf on Evidence:

> "The rule excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another, or a refusal to confess." *Ibid.*

[19] See Note, Harmless Constitutional Error, *supra*, note 14, at 84.

has been well stated by the Supreme Court of North Carolina, *State* v. *Rorie,* (1876) 74 N.C. 148;"

> "But the State says this was a denial of guilt and not a confession. It was a declaration which the State used to procure a conviction; and it is not for the State to say the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the prosecution? The use which was made of the prisoner's statement precluded the State from saying that it was not used to his prejudice." (p. 150) *Id.* at 542.

Thus, in 1897 the Court established a practice that it would not put itself in the position of second guessing the prosecutor concerning the prejudicial effect of a defendant's out of court statement. If the prosecutor did not think the statement would be helpful to his case—*i.e.,* prejudicial to the defendant—then why, asked the Court rhetorically, would he introduce it? This Court has never once departed from that practice in a case involving an out of court statement. Indeed, as recently as 1966, the Court explicitly answered the rhetorical question it had posed 70 years earlier: "If a statement made were in fact truly exculpatory," the Court said, "it would, of course, never be used by the prosecution." *Miranda* v. *Arizona,* 384 U.S. 436, 477.

During the intervening years between *Bram* and *Miranda,* the Court has constantly regarded the introduction of unconstitutionally induced out of court statements as grounds for automatic reversal, without regard to the "independent evidence tending to demonstrate the guilt of the petitioner." *Haynes* v. *Washington,* 373 U.S. 503,

518 (1963).[20] This has been the Court's practice even where the other evidence of guilt is overwhelming. See *e.g.: Rogers* v. *Richmond,* 365 U.S. 534, 541 (1961); *Payne* v. *Arkansas,* 356 U.S. 560 (1958). And as Mr. Justice Stewart has correctly observed:

> None of these decisions suggests that the rejection of a harmless error rule turns on any unique evidentiary impact that confessions may have. *Haynes* v. *Washington,* 373 U.S. 503, specifically contradicts that notion. In addition to the confession found inadmissible by this Court, the defendant in *Haynes* had given two prior confessions, the admissibility of which was not disputed, and substantial independent evidence of guilt existed. The court accepted the prosecution's contention that the inadmissible confession played little if any role in the conviction.

Chapman v. *California,* 386 U.S. 18, 43, note 1 (concurring opinion). This is not to deny, of course, that the introduction of defendant's out of court statements, whether confessions or admissions, generally do have unique evidentiary value.

> "The introduction into evidence of a defendant's out of court statement implicating himself in the crime charged is a significant step in the prosecution's attempt to obtain a conviction. The impact of such a statement stems not only from its contents, but also

[20] Indeed, this Court has suggested that the availability of other evidence makes the police activity in obtaining a statement even "more unwarranted because so unnecessary." *Haynes* v. *Washington,* 373 U.S. 503, 519 (1963).

from its tendency to make the prosecution's entire case seem credible." [21]

B. Extending the Harmless Error Rule to This Type of Case Would Commit the Court to the Time-Consuming and Purposeless Job of Distinguishing, on a Case by Case Basis, Among Various Kinds of Out of Court Statements (Confessions v. Admissions, Inculpatory v. Exculpatory Statements) Just at the Time When It Has Rejected These Distinctions in a Related Context.

This Court has not distinguished between "confessions" and "admissions," or "inculpatory" and "exculpatory" statements in deciding whether unconstitutionally obtained out of court statements can ever be harmless. Indeed, some of the leading cases involve admissions and exculpatory statements. In *Bram* v. *United States, supra,* the statement in question was surely not a confession; it was an exculpatory attempt to deny guilt. And the statement in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), was almost identical to the one in *Bram*: "the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself." *Miranda* v. *Arizona, supra* at 477. Nonetheless, the Court in *Bram* held explicitly, and the Court in *Escobedo* implicitly, that it would not inquire into the prejudicial effect of the statement; it will automatically require reversal, if the statement was introduced.

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[21] Note, 79 Harv. L. Rev. 935, 951 (1966) and see cases cited therein. This observation aptly describes the role of the admission involved in the instant case. Mrs. Miller's admission that she continued to love Hayton even after her husband's death did indeed tend to "make the prosecution's entire case seem credible." See *infra* Conclusion and Suggested Disposition.

This Court should not now, for the first time, make the application of the automatic reversal rule turn on whether the unconstitutionally introduced statement was an admission rather than a confession or exculpatory rather than inculpatory. These anachronistic and technical distinctions, which have needlessly consumed much judicial energy over the years, serve no useful function. It would be particularly ironic for this Court to resurrect these distinctions in the harmless error context at a time when it has just completed their internment in a closely related context. In *Miranda* v. *Arizona, supra,* the Court held that:

> The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of *any* statement made by a defendant. *No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense.* The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, *no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory."* If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. *Id.* at pp. 476-77 (emphasis added).[22]

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[22] In the recent case of *People* v. *Powell,* 59 Cal. Rptr. 817, 429 P. 2d 137 (1967), the California Supreme Court relied on the distinction between confessions and admissions, holding that the "introduction of a confession obtained from the defendant in violation of constitutional guarantees is prejudicial *per se* and compels reversal regardless of other evidence of guilt;" (citing many federal

C. Extending the Harmless Error Rule to This Sort of Case Would Place the Court in the Unseemly Position of Giving "Final Effect to a Judgment Tainted With [Particularly Reprehensible] Intentional Misconduct".

No doctrine of harmless error should be permitted in a case of this sort which fits squarely into the suggested rule that "certain types of official misbehavior require reversal simply because society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct." [23] Even the California District Court of Appeals was shocked at the "incredible" and "completely indefensible" trick employed by the authorities to get petitioner to make certain statements and to "throw herself on the alleged mercy of the sheriff and to suspect her own attorney." [24] This is in

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cases), whereas "the erroneous introduction of an admission is not prejudicial *per se* and the appellate court must weigh its impact on the trial in the light of the appropriate 'harmless error' test" (citing only local California cases). *Id.* at 148. The court conceded that there were "difficulties" in trying to make such a categorization, but nevertheless proceeded to do so. A close reading of the decision reveals that the California Courts are not even following the rulings of this Court in the area of confessions. The Court talks about an "exception" to the rule requiring automatic reversal when an unconstitutionally obtained confession is introduced at trial. This exception prevails when the unconstitutionally obtained confession is cumulative of other valid confessions. This exception flies directly in the face of the explicit holding of this Court in *Haynes* v. *Washington*, 373 U.S. 503, see *supra*, text following footnote 20.

[23] *Chapman* v. *California*, *supra* at 52 note 7 (Harlan, *J.*, dissenting), citing *"Berger* v. *United States*, 295 U.S. 78 (prosecutorial misconduct)."

[24] Indeed, the California District Court of Appeal considered the possibility of reversing the conviction "just to administer to the sheriff and those joining in this most *inexcusable* procedure a *well-merited rebuke* . . ." (emphasis added). The Court concluded however, that to do so "would not be fair to the county of San Bernardino nor to the defendant in requiring her to undergo the

stark contrast to the situation in *Chapman* v. *California, supra,* where the comments by the prosecutor and judge were explicitly authorized by the state constitution and not yet disapproved by this Court at the time they were made. *Id.* at 19.

D. Extending the Harmless Error Rule to the Prosecutor's Deliberate Decision to Introduce a Statement Deliberately Induced in Violation of the Constitution Would Encourage Some Prosecutors to Take Unsavory Gambles by Introducing Unconstitutionally Obtained Statements Which They Regard as Potentially Helpful to Their Case, But Which They Believe an Appellate Court May, on a Cold Record, Regard as Harmless.

This Court has never applied, and should not now apply, the harmless error rule to a two-stage constitutional error such as that involved in the case at bar. In this case, there was "intentional misconduct" by the state at two distinct points: (1) when they intentionally planted Peggy Fisk in petitioner's jail cell; and (2) when they intentionally introduced Miss Fisk's testimony at petitioner's trial. This should be distinguished from the situation in *Chapman* v. *California, supra,* where the making of the objectionable remark constituted a *single* error (which had not even been held unconstitutional at the time it was made). In the case

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strain of another trial." Petitioner hereby goes on record as indicating her willingness—indeed her desire—to undergo another trial at which the objectionable testimony would not be admitted. As for any unfairness to the County (as distinguished from "the sheriff and those joining in this most inexcusable procedure"), it must be recalled that the sheriff was acting as an agent of, and on behalf of, the County. Only by reversing such convictions—at the cost to the County of a new trial—can the court's hope to discourage such "inexcusable" practices.

at bar, the sheriff made a calculated decision to violate the constitution in order to obtain evidence helpful to the state, and the prosecutor made a second calculated decision to introduce the evidence which he knew was unconstitutionally obtained. The prosecutor made this decision because he regarded that evidence as sufficiently helpful to his case—i.e. prejudicial to petitioner—to warrant the risk of appellate reversal. "Why introduce it at all unless it was to lay a foundation for the prosecution?" [25] This Court should not now let the prosecutor "have his cake and eat it too." It should not put itself in the position of second-guessing the prosecutor on the basis of a cold record. Whenever the prosecutor has made a calculated decision to introduce unconstitutionally induced out of court statements, this court should assume—as the prosecutor himself assumed—that such statements were prejudicial.

If this Court begins to second-guess such prosecutorial decisions, it will only encourage some prosecutors to take

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[25] *State* v. *Rorie* (1876), 74 N.C. 148, quoted with approval in *Bram* v. *United States, supra* at 542. This Court has never found harmless error in a case involving a two-stage intentional error. In *Motes* v. *United States,* 178 U.S. 458 (1900), one co-defendant had made a voluntary statement incriminating other defendants. The prosecutor had acted entirely properly in obtaining this statement. The maker of the statement then escaped as a result of "the negligence of the prosecution," *Id.* at 474, and the prosecution then introduced the statement. This Court held that it should have been excluded, as a "violation of the constitutional right of the defendant's to be confronted with the witnesses against them" *Id.* at 471. The Court reversed the convictions of all the defendants except *Motes,* since the "case as to him rests on peculiar grounds:" he made a complete and "conclusive" confession of guilt at the trial so as "to require a verdict of guilty as to him, even if the jury had disregarded (the other) statements altogether." *Id.* at 475. *Motes* is apparently the "first and only time" the Court has ever "held harmless an error that violated the Constitution." Note, 20 Stanford L.R. 83, 85 (1967). The "peculiar grounds" of that case—Motes' in court confession—severely limits its precedential value.

unsavory gambles: to introduce unconstitutionally-induced statements which they regard as potentially helpful to their case, but which they believe an appellate court may, on a cold record, regard as "harmless."

E. Extending the Harmless Error Rule to This Type of Two-Stage Intentional Error Would Serve None of the Salutary Purposes Advanced in Support of the Harmless Error Rule in Other Contexts.

There are no affirmative reasons for permitting a harmless error rule in the context of a two-stage intentional error. When the alleged error is a single "bungle" by the prosecutor or the judge, the argument for a harmless error rule is at least understandable: The absence of such a rule might convert the criminal trial into "a game for sowing reversible errors in the record."[26] But when the error is two staged and intentional, as it was here, then its "sowing" is under the direct control of the prosecutor and not the defendant. And there is simply no good reason for an appellate court to treat as harmless a statement which a calculating prosecutor deliberately introduced in the hope that it would help his case.[27]

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[26] *Kotteakas* v. *United States*, 328 U.S. 750, 759 (1946), quoted in *Chapman* v. *California, supra*, at 49 (Harlan, *J.*, dissenting).

[27] Mr. Justice Stewart explicitly recognized this when he observed "Prosecutors are unlikely to indulge in clear violations of *Griffin* in the future, and if they do, I see no reason why the sanction of reversal should not be the result." Even the California courts have apparently held that "reversal will be required when the tainted evidence is introduced in intentional violation of constitutional standards. See *People* v. *Sarazzaswki*, 27 Cal. 2d 7, 161 P. 2d 934." *Chapman* v. *California, supra* at 52 (Harlan, *J.*, dissenting).

Conclusion and Suggested Disposition

Even if this Court rejects petitioner's argument that *all* unconstitutionally obtained out of court statements introduced into evidence must be deemed prejudicial, it should not affirm this conviction. The record in this case plainly establishes that the California District Court of Appeals, which decided the case before this Court's decision in *Chapman* v. *California, supra,* applied an improper standard of harmless error, and that the error in this case could not possibly be found harmless under a correct standard. Accordingly, this Court should either reverse the conviction on the authority of *Chapman,*[28] or vacate the judgment and remand the case to the California Courts for reconsideration in light of that intervening decision (as it has already done in a number of other cases decided after *Chapman*).[29]

The critical factual issue in the trial of this case was whether the fire that caused Dr. Miller's death was of accidental or incendiary origin (R. 244, 262, 1578, 1809-10). In attempting to persuade the jury that the fire was started by petitioner, the state relied most heavily on petitioner's alleged motive for wanting her husband dead: her love for Arthwell Hayton, with whom she had concededly had an affair and with whom, according to the state's theory, she was *still* infatuated. (See e.g., R. pp. 4-5, 10, 12, 1258, 2015, 2019, 2025.) The defense, in its effort to cast doubt upon the state's motive theory, attempted to show that petitioner's infatuation with Hayton had *ended* before her husband's death (R. 874, 935, 1783-88).

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[28] See, *Olmstead* v. *United States,* 277 U.S. 438, 466, 488 (1928).

[29] See note 32, *infra.*

It is in light of this trial background that one must evaluate the impact of Peggy Fisk's testimony that petitioner had admitted to her after Dr. Miller's death that "she did not love her husband" and that "she had always loved Mr. Hayton and *still loves him*" (emphasis added). This was the *only* evidence establishing the government's disputed assertion that petitioner continued to love Hayton up to and after her husband's death; and it must have been quite persuasive, coming as it allegedly did from the mouth of the petitioner herself.

That the prosecutor regarded Peggy's testimony as important is evidenced by his use of it in his closing argument to the jury (a use which the California District Court of Appeals failed to mention in its opinion holding the testimony harmless). Quotation of one such statement makes it clear that the testimony was prejudicial:

> How about Mr. Hayton? She testified that her love for him died the same time her husband did . . . But that's not what she told the girl up in jail. She told the girl up in jail that she still loved Hayton, felt that he would come to her (R. 2019).[30]

Could any court confidently say, in the context of this "close" case where motive played such a central role, that there was no "reasonable *possibility* that the evidence complained of *might* have *contributed* to the conviction?" *Fahy* v. *Connecticut*, 375 U.S. at 86, 87 (emphasis added).[31] Has

[30] See also R. 2061-62. In his argument opposing an advisory verdict at the close of the state's case, the prosecutor also emphasized petitioner's admission to "the girl up in jail that she still loved Mr. Hayton. She did not love her husband" (R. pp. 1258-59).

[31] The jury deliberated for more than three days (R. 2376). The District Court of Appeals noted that this case of "circumstantial evidence . . . was bitterly contested," and that "much of the evidence was conflicting." 53 Cal. Rptr. at 727.

the state, which was "the beneficiary of [the] constitutional error," proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained?" *Chapman* v. *California, supra,* at 4199. Since this Court cannot, on the record of this case, "declare a belief that [the error] in this case was harmless beyond a reasonable doubt," it should reverse petitioner's conviction so that she may be given a new trial at which the unconstitutional evidence would not be admitted.

At the very least, this court should vacate and remand for reconsideration in light of *Chapman* v. *California, supra,* which was decided after the last action of the California courts in this case, and which conclusively establishes that the District Court of Appeals in deciding that the introduction of Peggy Fisk's testimony was harmless error, was applying an erroneous constitutional standard.[33]

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[33] In his opinion, Justice Bray verbalized the rule in a number of different ways. As one point—while discussing defense counsel's alleged failure to object—he remarked that the court would be empowered to order a reversal, despite counsel's failure to object, "if he had the slightest idea that defendant was injured . . ." 53 Cal. Rptr. at 740. At another point, he remarked that Peggy Fisk's testimony "did little if any harm to defendant." (Emphasis added.) But is it not necessary to undertake a close analysis of Justice Bray's differing verbal formulae. Whatever language he chose to employ, this Court should assume that he was applying the mandatory standard which the California Constitution required him to apply.

> "No judgment shall be set aside . . . unless after an examination of the entire case . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." California Constitution, Art. VI § 4½.

This was the very standard which, as construed by the California Courts, was declared unconstitutional in *Chapman* v. *California.* And this was the standard which this Court assumed was applied by the California courts in the numerous cases which, on March 13, 1967, it remanded for reconsideration in light of *Chapman,* see 35 L.W. 3320-21.

(continued on following page)

For the foregoing reasons, it is respectfully submitted that the judgment of the court below be reversed, or in the alternative, that the case be remanded for reconsideration in light of *Chapman* v. *California, supra.*

Respectfully submitted,

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Counsel for Petitioner

One of those cases was *People* v. *Otwell* (sub nom. *People* v. *Butts*). In that case, the California District Court of Appeal had held, prior to this Court's decision in *Chapman*, that the prosecutor's comment on Otwell's failure to take the stand was "harmless error". There too the California court used language which might seem to conform to the *Chapman* criterion: "it could hardly have altered the jury's view . . ."; "a verdict of acquitted or of guilt of a lesser offense would have been a veritable blunder." 236 C.A. 2d 817, 833-34 (1965). But there too, this Court remanded for reconsideration in light of *Chapman*, 87 S. Ct. 1036 (1967). And reconsideration led to a different outcome by the California District Court of Appeal. See *People* v. *Otwell*, 61 Cal. Rptr. 427 (1967).

Counsel has learned, via telephone communication with the clerks of Court, that there have also been reversals in *People* v. *Stanley Ray Davis*, 1 Crim. 5101 (Cal. Dist. Ct. App., 1st App. Dist. San Fran.), previous decision 87 S. Ct. 1038.

SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967
No. 154

LUCILLE MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE RESPONDENT.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 154

LUCILLE MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The original opinion of the California District Court of Appeal for the Fourth Appellate District was set forth in 245 A.C.A. 111. A modification was set forth in 245 A.C.A. 732. The opinion as modified and the order of the Supreme Court of California denying a hearing are reported in 245 Cal. App. 2d 112, 53 Cal. Rptr. 720.

The various opinions are set forth in Appendices A and B of the Petition for a Writ of Certiorari to the Supreme Court of California of petitioner.

JURISDICTION.

Jurisdiction is conferred on this court by Title 28, section 1257(3), United States Code.

The judgment of the District Court of Appeal was entered on September 22, 1966. On rehearing, the modification was entered on October 22, 1966. The Supreme Court of California denied a hearing by an order entered on December 14, 1966.

A timely petition for writ of certiorari was filed in this Court. A response was requested of respondent. After submission of the response, a second response was requested of respondent. After submission of the final response, the petition for certiorari was granted on December 4, 1967, in number 1383 O.T. 1966.

STATUTES INVOLVED.

Relevant statutes and constitutional amendments, federal and state, are set forth in the Appendix.

QUESTIONS PRESENTED.

1. Are the constitutional rights to counsel and against self-incrimination violated by the introduction of admissions made to an undercover agent placed in Petitioner's jail cell by the police.
2. Can the harmless error rule be applied to a conviction where evidence of Petitioner's admissions made under circumstances like those here involved was introduced.

SUMMARY OF FACTS.

Dr. Gordon Eugene Miller a dentist died in a matter of seconds as a result of an incendiary conflagration started in the passenger compartment of his Volkswagen, with an accelerant, on a dark, lonely, deserted road while sound asleep from an overdose of Nembutal, which he was not i the habit of taking and which had not been in his system for more than two to four hours.

Petitioner, his wife, was the only person that could have given him the drug which she had procured without his knowledge. Petitioner was the only person who could have started the fire. She had long since lost her affection for him and given it to another man.

There were many circumstances shown by the evidence contradicting petitioner's story of the action of the auto before the fire started supporting the prosecution's theory of a deliberately started fire. Among others was the evidence that the fire could only have been started by an accelerant; the facts that Dr. Miller was sound asleep from an overdose of Nembutal which he wasn't in the habit of taking, and which could only have been given him by petitioner, as petitioner stated that he did not get the Nembutal, that she had purchased it; that petitioner drove on a dark, lonely, deserted road; that petitioner had given Dr. Miller pills all week which were making him dizzy; the peculiar circumstance that a man recovering from the flu would ride many miles late at night bundled up in a blanket to get milk; that petitioner chose the leased car with which she admitted she was not too familiar instead of her larger, more comfortable one; and the fact that the damage to the Volkswagen was not consistent with an accidental fire.

The evidence supported the prosecution's theory that petitioner had planned for the car to go over a wall, land on the gas tank and be set afire; that she attempted to drive the vehicle over the edge but was thwarted. As the rear wheels spun, the car settled on a rock. A reasonable inference can be drawn that petitioner had stopped the car on the pavement, spread the gasoline, put the car in low gear and started it to-

wards the edge, that it was stopped by the shoulder and that after repeated attempts to run the car over the edge, petitioner lit the fire. The only parts of petitioner's body that were singed by fire were a slight singe of the hair on the back of her head and on her right forearm. This was consistent with the singeing having occurred as she reached toward the gasoline flowing from the tilted can with a burning stick and turned her face away as she set the fire. As the car was to close to the retaining wall, petitioner could not have run around the car to the doctor's side, as she testified, without falling over the wall.

A reasonable inference is that petitioner wanted Dr. Miller's body to be consumed to avoid the discovery at an autopsy of the barbiturates. When arrested she had asked the officers if there was enough left of the doctor for an autopsy. Petitioner made no reasonable effort to save the doctor after the fire. Petitioner was wearing Dr. Miller's watch and no trace was found of his wallet which contained considerable money and from which she took the money to pay for the milk.

There was evidence that petitioner was a selfish and avaricious woman who had long before lost all love and interest in her husband and the life he was providing for her. She wanted another man's love, money, social status, prestige, and association with wealthier people.

STATEMENT OF FACTS.*

The Crime.

In the early morning hours of October 8, 1964, petitioner came to the home of Marice Swenson on Saphphire in Alta Loma and said, "Help me. Help me. My car is on fire. Cork is all burned." She said she did not know on what street the car was located. [Rep. Tr. pp. 63-66.] The fire was on Banyan ½ mile away. [Rep. Tr. pp. 1369-71.] Mrs. Swenson got in touch with the sheriff. [Rep. Tr. p. 67.] Mrs. Swenson was unknown to petitioner, however, Catherine Bridge, who lived on the corner of Banyan and Cornelian, had met petitioner in June of 1964 when petitioner used her telephone after an accident. [Rep. Tr. pp. 702-06.] While waiting for the sheriff, petitioner said that the boys would miss their dad; that 1964 had been a terrible year, and that they had gone to the store. She rambled on about various things. She said that she thought that she had a bump on her head and asked Mrs. Swenson to look, but Mrs. Swenson could not see anything. As petitioner leaned over, Mrs. Swenson smelled the scent of burned hair on the back of petitioner's head. Petitioner was playing with a white scarf that was scorched. Her face and hands were smudgy; her clothes were rumpled, but Mrs. Swenson did not notice any special dirt or disarray. [Rep. Tr. pp. 68-70.] She was wearing her husband's watch. [Rep. Tr. pp. 1394, 1398-1401.]

Harold J. Lance, an attorney friend of petitioner, arrived in response to a call from Mrs. Swenson and petitioner told him what had happened. She said, "Oh,

*Page references are to the Reporter's Transcript and Appendix to Brief for the Respondent.

my God, it's terrible, Harold, Cork's dead. He's all burned up." When Lance asked if Cork was dead petitioner said, "Oh, yes." She told Lance that she was not sure of the name of the street but that she thought it was where her previous accident had occurred. They started to drive to the scene [Rep. Tr. pp. 105-08] when Charles Hogancamp, Chief of the Alta Loma Fire Prevention District, drove up. They all attempted to go to the scene of the fire but petitioner allowed them to proceed in the wrong direction for about a mile until she was questioned by Lance at which time she directed them back down hill to Sapphire and Banyan from where they could see the burning Volkswagen. [Rep. Tr. pp. 74-77, 80, 108-09.]

There was no one at the fire. The door on the left side was wide open and the trunk lid was closed. The engine lid was closed. The Volkswagen was burning at the rear, around the motor and the rear tires. Hogancamp saw a body on the seat of the Volkswagen. He opened both the trunk and the engine lids. [Rep. Tr. pp. 80-90, 109.]

California Highway Patrol Officer Robert A. Robinson having received a call to proceed to the Alta Loma area arrived at the scene of the burning Volkswagen at 2:20 a.m. He noticed the fire burning in the rear portion of the passenger compartment and the engine compartment. [Photo Exs. 7, 10, 14, 15, 16.] The remains were still in the car. He saw a can directly behind the driver's seat. [Rep. Tr. pp. 344-48, 385.]

Later when petitioner returned to the scene with Lance, Officer Robinson had a conversation with her. [Photo Ex. 8.] She said that she had been driving the Volkswagen east on Banyan about 35 to 40 and had

gone only a short distance from Sapphire Street when the Vehicle pulled to the right or the left. She was not sure which way. The vehicle was off to the right side of the roadway, and the fire was immediately at the back of her head. She got out of the car at that time, went around to the right side of the vehicle and attempted to get the right door open. The door was locked. She used a rock to break the right rear window of the Volkswagen. By that time the flames were too hot and she was unable to do anything. She appeared calm. She was not crying and only became upset when one of the photographers took a picture. [Photo Ex. 8.] Petitioner told Officer Robinson that her husband and she had left the house about 11:30 to go to Woody's on Euclid, but it closes at midnight and was closed. They needed milk so they drove over to Montclair to the Mayfair Market on Central Avenue. After they got the milk they were en route home, and she turned right from Sapphire to Banyan. The fire singed the hair on the back of her head. Her husband was lying across both seats. He asked her what had happened to the left front of the car, and she said that her husband hit a German Shepherd that day on Cornelian Street about 7 p.m. and they had stopped and talked to the owner. She said that when the car first got in trouble, Dr. Miller had said, "Oh," or something similar. She said that she thought that Dr. Miller was knocked unconscious—that he must have hit his head, but she did not see him hit anything. He asked her whether she used Banyan Street frequently, and she replied that she did and had last used the start the day before. [Rep. Tr. pp. 110, 351-53, 361-69, 684.]

The Volkswagen was on the outside of the roadway on the dirt shoulder. A portion of it was on the pave-

ment. Officer Robinson saw a 30-40 foot tire mark leading from the edge of the roadway, leading up in an easterly direction across the dirt shoulder portion of the roadway to the right rear tire and in the same line as the car. The mark had been made by an inflated tire as distinguished from a tire that was flat or in the process of deflating, for there was no indication of distortion or wobbling within the mark itself. [Rep. Tr. pp. 354-56, 468-69, 495-98.]

Detective Charles A. Callahan from the San Bernardino County Sheriff's Office arrived at the scene at about 5:52 a.m. and helped take some measurements. The Volkswagen was parked on the dirt shoulder of the road by a lemon grove with the wheels cramped toward a retaining wall with a four foot dropoff. The front wheels were 10 inches and the back wheels 2 feet from the wall. [Photo Ex. 18.] [Photo Exs. 17, 19.] The tires of the Volkswagen except for the left front were burned through to different degrees and deflated. The right rear wheel was in a hole which he later inspected. [Photo Exs. 20, 21, 22; Rep. Tr. pp. 387-99, 468-69, 495-98.]

Joseph Milton Karr, a Homicide Detective, and Sergeant William Paterson, both of the San Bernardino Sheriff's Homicide Bureau went to the scene of the Miller Volkswagen fire. They noticed a branch with one end charred just below the end of the left door which Sergeant Paterson later retrieved. [Ex. 35.] [Photo Exs. 7, 29.] [Rep. Tr. pp. 802-10, 691-94.]

John Robert Davidson, a criminalist employed by the San Bernardino Sheriff's Office crime laboratory, went to the scene at 7:25 that morning. He looked inside the car at the rear seat area [Photo Ex. 13]. There

was a large rock in the middle of the seat against the far wall. He removed it and determined that it weighed nine pounds. He found the ash remains of a Poloroid Land camera and a pamphlet concerning that camera, which he removed. He found no remains of a blanket or a wallet.

There was a one-gallon metal can on the floorboard just in front of the back seat on the driver's side which he removed and took to the crime laboratory with the other things. [Exs. 28, 29.] The can did not have a cap on it and was similar to the can produced in court. [Ex. R.] Some writing visible on the can corresponded to the can marked Exhibit R. [Rep. Tr. pp. 420-26, 459-60, 556].

Davidson examined the can with a J-W aromatic hydrocarbon indicator (a sniffer). There were no hydrocarbons indicated. Under the circumstances of the fire, he would not expect that gasoline would remain in the can. The can showed no indication of distortion or bulging. The neck was still on it. The threads had a burned residue, but were not stripped. After the examination of the can, it was left in the laboratory, but not placed in the evidence locker, and the janitor threw it away. [Rep. Tr. pp. 427-32.]

Davidson looked inside the car in the area of the front seat. [Photo Ex. 11.] The contents of the glove compartment were burned. (Road maps, papers, warranty or service booklets, serial number tag.) He examined the doors and found there was no glass left in them except for some glass in the top channel of the left door. He concluded that the window of the left door had been all the way up at the time of the fire, while the window of the right door had been nearly all

the way up. The ignition was on. The gear shift was in first gear. The hand brake was off. The heater was turned on. The headlight switch was in the parking light or middle position, which was determined by measuring the stem in the three positions and comparing the distances with other Volkswagens, and as shown by the burn mark. [Rep. Tr. pp. 433-40, 1745-50; Ex. 43.]

Anthony Longhetti, a Sheriff's criminologist, also examined the gas can found in the Miller Volkswagen and found it to be in the same condition found by Davidson, the other criminologist. [Ex. 28; Rep. Tr. pp. 568-69.] During the trial Longhetti burned two cans comparable to Exhibit R in a fire while the lids were securely tightened, one can filled entirely with gasoline and the other one-third filled. Both cans exploded. The top and the neck spout came out from the can itself. As soon as possible the cans were smelled and no trace of gasoline odor was present. Within an hour the cans were tested with a J-W aromatic hydro-carbon indicator and the test was negative. [Photo Ex. 31; Rep. Tr. pp. 571-76.]

On November 18, 1964, a 1964 Volkswagen was burned experimentally under similar conditions as the Miller Volkswagen fire. [Rep. Tr. pp. 503-16.] In that experiment, Longhetti placed a gas can similar to Exhibit "R" inside the car. It was placed in the left rear behind the seat of the automobile, and approximately one-third to one-half of the gasoline was allowed to run out of the can onto the rear floor of the vehicle. The can was left in a position almost on its side slightly tilted upward with the cap off essentially in the position of the can depicted in Photo Exhibit 28. After the fire Longhetti examined the can. It was in the

same condition as the can in the Miller Volkswagen fire. The handle was off but the neck or pouring spout was still intact and present on the can. [Rep. Tr. pp. 559-71.] The results of the experimental burning were practically identical to those of the fire in question. [Rep. Tr. pp. 335-40, 551-55.]

An examination by Davidson of the battery and the battery cable leading to the generator on the Miller Volkswagen show no evidence of an electrical short. [Rep. Tr. pp. 442-43.] An examination by Davidson of the left front tire and rim of the Miller Volkswagen show no evidence of a blowout though a nail was present. [Exs. 23, 24; Rep. Tr. pp. 443-47.] An experiment with an identical tire with an identical nail inserted proved the tire would not lose pressure or blow out from the presence of the nail. [Ex. 25; Rep. Tr. pp. 449-52.] An examination by Davidson of the gasoline line on the Miller Volkswagen and experiments with an identical gas line [Exs. 26, 27] proved that the gasoline line could not have come off without a pull of 25 to 30 pounds when soaked in gasoline, 35 to 50 pounds when wet with gasoline running through the tube, and 55 to 58 pounds when dry. [Rep. Tr. pp. 452-55.]

At about 5 p.m. on October 8, 1964, Dr. Irving Root, M.D., a pathologist performed an autopsy on the body of Dr. Gordon Miller in Ontario at Draper Mortuary at the request of the County Coroner's Office. Present were Dr. F. Rene Modglin, and Longhetti. [Rep. Tr. pp. 112-15.] Dr. Root determined that the cause of death was conflagration. He found respiratory tract burns, almost complete charring of the body, a saturation of approximately 20 per cent of carbon monoxide in the blood so as to indicate that Dr. Miller was

alive at the time the fire began and his death was essentially due to conflagration. Dr. Root was unable to determine any antimortem physical injuries. Death occurred in a matter of seconds because of the inhalation of flames shown by the burns of the respiratory tract and the extensive heat both causing death. [Rep. Tr. pp. 115-20, 176-79.]

Chemical analysis of blood and organs by Longhetti showed no alcohol, a carbon monoxide saturation of 20 per cent, a blood barbiturate level of 13.7 micrograms per milliliter of blood consisting of itobarbital commonly known by the trade name of Sandoptal, and Pentobarbital, commonly known by the trade name Nembutal, a urine barbiturate level of 5.9 micrograms per milliliter of urine and a liver barbiturate level of 29.5 micrograms per gram of liver consisting of the identical barbiturates found in the blood. [Rep. Tr. pp. 132-48.] On October 14, 1964, Dr. Modglin found a 13 percent saturation of carbon monoxide in the blood, 15 micrograms of barbiturates per milliliter of blood consisting of Pentobarbital, commonly called Nembutal and Sandoptal, a Swiss drug not common in the United States but found combined with a mild pain reliever one of which is Fiorinal. Dr. Modglin testified that the effect of Nembutal lasts about three to six hours, while Sandoptal has a maximum effect of about three hours. Both are to relax and produce sleep. The barbiturates are absorbed, get into the blood stream, and are distributed throughout the body. The liver and the kidneys retain most of the barbiturates, and their function is to get rid of them. Barbiturates are not absorbed all at once. The effect depends on how much is given and the other contents of the stomach. The effect

is expected within a half hour. The amount of barbiturates in the blood stream will gradually rise until no more is present in the stomach. It will then reach a more or less constant level and very slowly be eliminated from the blood. It will drop rapidly from a maximum and will then reach a more or less steady point where it will begin a slow elimination. [Rep. Tr. pp. 180-87.]

Based upon Longhetti's findings, Dr. Modglin was of the opinion that the barbiturates had been in association with Dr. Miller for a matter of only two to four hours. [Rep. Tr. pp. 187-90.] Barbiturates are hypnotic drugs and induce sleep, and the amount indicated in the above analysis was a much higher level than a normal therapeutic dose. It was not enough in blood level to expect to have produced death. It was enough in blood level to produce sleep but doubtful that a coma would be caused. It is possible for one to take considerably larger than a therapeutic dose unknowingly and without realizing it because barbiturates have a mind-dulling action. Such action can cause a person to forget that he has taken a barbiturate and take more. It is medically possible to empty a bottle in such a fashion. [Rep. Tr. pp. 190-91.]

William Arthur Snare, a Special Agent for the National Automobile Theft Bureau, a nonprofit organization for the investigation of automobile identification vehicle theft number restorations and automobile fires in cooperation with law enforcement, assisted in the investigation of the fire involving the Miller Volkswagen. He was an expert in automobile arson and had conducted 113 experimental automobile burnings. [Photo Ex. 7; Rep. Tr. pp. 202-07.] Based upon his examina-

tion of the car and his expertise Snare reached certain conclusions about the fire. The left passenger door had been opened at least 18 inches at the time of the fire. The right passenger door had been closed. All the car upholstery had been burned. [Photo Exs. 11, 12, 13; Rep. Tr. pp. 219-26.] The glass on the left front door had been in a raised or closed position during the fire. The wind wings were closed during the fire. Most of the floor of the vehicle had been burned. There was a trace of Dr. Miller's slacks on the seat. The remains of two milk cartons and a manilla bag were present. [Rep. Tr. pp. 226-29.] The gas can cap was found just inside the door and removed from the car by Deputy Sheriff Fred Smith. The cap was undamaged. There was no indication that the cap had been on a can which had exploded. There was a flex pouring stem from the gas can directly behind the driver's seat. Deputy Fred Smith removed it. Near the remains of the milk carton there was a five by four inch piece of glass which appeared to have come from the rear window. The upholstery of the Volkswagen was a vinyl material which would not burn by itself in that only the gases it gives off will burn. Heat must be applied continuously from other materials in order to entirely consume such material. [Rep. Tr. pp. 230-33, 259-60, 717-27.] There was no way for gasoline to have gotten from the fuel line between the gas tank and the engine into the passenger part of the vehicle. The flex gas line of the vehicle was made of cord re-enforced neopreme, a nonexplosive nonfire sustaining material which will not burn if the source of ignition is taken away from it. The fuel line had been in position at the time the fire started and was burned off. The gas

line where it connects to the fuel pump and the carburetor had been in place at the time of the fire. [Rep. Tr. pp. 234-37.] The area of greatest heat was to the left side of the vehicle. [Rep. Tr. p. 237.] There was no evidence of electrical short in the battery or in the battery cable as it passes through the passenger compartment through a hole in the firewall to the generator. [Rep. Tr. pp. 238-42, 259-60.] There was no evidence of overheating of the car engine prior to the time of the fire. [Rep. Tr. p. 253.]

The fire had originally started at seat level in the passenger compartment. [Rep. Tr. pp. 328-30, 242.] The fire in the passenger compartment burned out and then a second fire originated underneath the car as a result of gasoline draining out of the car itself. After the fire had burned for some time, it burned off the flexible coupling, allowing the gasoline to drain from the gas tank into the gas line and to the ground underneath the rear portion of the car. Snare was unable to find any nonhuman source or origin of the fire. [Rep. Tr. p. 243.] He concluded that the fire was of an incendiary origin. [Rep. Tr. p. 244.] Furthermore, he was of the opinion that the fire had been started with an accelerant. [Rep. Tr. pp. 261-62.] It is practically impossible to start a fire in the passenger compartment of a car without an accelerant and when this is accomplished it takes several minutes to an hour for flames to appear and such a fire will not totally destroy a car in the fashion the Miller Volkswagen was destroyed. [Rep. Tr. pp. 244-46.] Fires which start in the engine compartment cause the immediate cessation of engine operation. [Rep. Tr. pp. 253-56.] Where a fire starts in the engine compartment from gasoline leakage there

is an odor of gasoline in the car and a trace of gasoline drippings behind the car, none of which appeared in the Miller Volkswagen fire. Assuming a fire in the engine compartment of the Miller Volkswagen car the engine would not have kept running and the rear wheels could not have dug into the ground. [Rep. Tr. pp. 256-58.] The use of an accelerant is indicated by a rapid and complete burning of flammable materials in a car such as found in the Miller Volkswagen. Large quantities of unburned material are found where no accelerant has been used. [Rep. Tr. pp. 61-62.]

Manfred Kase, a Volkswagen mechanic with training and experience of six years, examined the Miller Volkswagen on October 11, 1964 in the presence of Detective Karr. There was no defect in the steering. [Rep. Tr. pp. 583-85.] There was no damage to the gas tank or the fuel line. [Rep. Tr. pp. 585-86.] The right front door was locked. The damage to the left front fender under the headlight which had been caused by striking a German Shepherd did not effect the steering. [Rep. Tr. pp. 215-17, 589-90.] The gear shift was in first gear position. The gears themselves were not in third or fourth. Low gear was missing. [Rep. Tr. pp. 634-35.] In that gear the Volkswagen can go 20 miles per hour. At idle speed in first gear the Volkswagen will go walking speed. [Rep. Tr. p. 590.] He had seen a half a dozen Volkswagens that had had fires in the engine compartment and in none of these cases had the fire progressed into the passenger compartment. In most instances, the fire was due to the failure of the car mechanic. Engine fires cause the engine to stall. [Rep. Tr. pp. 591-93.]

On November 17, 1964, Heinz K. Ofner, field service engineer for Competition Motors Volkswagen Distributors for Southern California and Arizona examined the Miller Volkswagen. He had been a Volkswagen mechanic since 1950 in Germany. There was no deficiency in the steering of the Miller Volkswagen. [Rep. Tr. pp. 603-07.] There was no damage to the gas tank. [Rep. Tr. p. 608.] The passenger compartment was entirely protected from the gas line. [Rep. Tr. pp. 609-18.] There had been no difficulty with neopreme gasoline tubes on Volkswagens unless very old and removed many times. They won't work off [Rep. Tr. pp. 620-21, 1852.] Only fresh air and no exhaust can get into the heating system of the Volkswagen. [Rep. Tr. pp. 622-25.] If the engine overheats it will eventually stop and the driver is warned by a red light. [Rep. Tr. pp. 627-31.] Fire in the engine compartment would kill the engine and the fire could not be drawn through the car heating system. [Rep. Tr. pp. 637-44.] A fire could not enter the passenger compartment from the engine compartment until a rubber grommet surrounding the battery cable had been burned away. [Rep. Tr. pp. 636-47.] A fuel line leak would leave a trail of gasoline on the pavement and if ignited it would be a flaming trail. The flames could not get to the engine compartment because it is sealed off. [Rep. Tr. p. 647.]

The inside measurement from door to door on the front seat of a Volkswagen is three feet nine inches. To lock the right front door the handle is pushed forward until it stops and then it snaps back into the normal position. The doors open from the inside by pulling back on the handle whether it is locked or not. [Rep. Tr. pp. 1848-50.]

On the week of his death Dr. Miller had not worked all that week. He came to his office to look at his mail on the afternoon of October 6, 1964 for half an hour, at which time he told his dental assistant, Gwen McIntosh, that he couldn't stay in the house any longer; that he felt better but was still dizzy now and then, and sometimes could not focus his eyes. He said that he had been taking large brown capsules given him by petitioner that had made him dizzy and that he was not going to take them any longer. [Rep. Tr. pp. 792-94.] She had never seen him when he appeared to be under the influence of a drug and he only used to take two Fiorinal tablets at any time. Pills such as PAC with cyclopal for pain, Seconal and Fiorinal were available at Dr. Miller's office as he was a dentist. Petitioner had had these various pills brought home by Dr. Miller on occasions. [Rep. Tr. pp. 797-99, 1946-51.] Primarily, Dr. Miller only used Seconal and Fiorinal for headaches. [Rep. Tr. p. 1464.]

On October 1, 1964, Dr. Miller had shot a game of golf and had not shown any signs of being under the influence of any drugs. [Rep. Tr. pp. 1987-88.] Dr. Miller's accountant, Walter R. Nourse, never noticed him to appear under the influence of a drug. [Rep. Tr. pp. 1934-35.]

Two or three days prior to October 8, 1964, petitioner had bought a gallon of regular gasoline from David Beitzell at a Chevron Service Station after he had directed her to the Shopping Bag Market to purchase the gasoline can of the same type as Exhibit "R." [Rep. Tr. pp. 710-15, 1836-40.]

About 9 to 9:45 a.m. on October 7, 1964, petitioner came to the home of Dr. Edwin H. Ford, M.D., a friend

of the family and talked with Dr. Ford and his wife. She said that Dr. Miller had the flu and was dizzy. She said that she was going to a drugstore in Chino to get medicine including sleeping pills and Dr. Ford gave her six to eight one and one-half grain Nembutal capsules. Petitioner said, "He usually gets quite a few more than that. Couldn't I have a few more?" [Rep. Tr. pp. 751-55, 1413-18.]

About 10 to 10:30 that same morning, petitioner went to the Huntington Pharmacy in Upland and had the pharmicist Paul Robert Nave call Dr. John Mortenson from which he got a prescription for 30 Nembutol and one-half grain capsules which he gave to petitioner. [Rep. Tr. pp. 736-39.]

Late that night about 12:20 Niesha Chaplin saw petitioner driving the Volkswagen and next to her on the seat Mrs. Chaplin noticed a large lump of bundles which on closer observation appeared to be a human being. The person appeared to be lying in a slumped position with his head far to the side of the door. [Rep. Tr. pp. 160-66.] Petitioner pulled into the same parking lot at the market but parked on the edge of the parking lot away from the light standard. Petitioner got out of the car, leaned over, looked back inside to the driver's open window and then walked into the store. [Rep. Tr. pp. 164-68, 1387.]

The Motive.

Dr. Miller had over $100,000 of life insurance including double indemnity payable to petitioner of which petitioner had knowledge. [Rep. Tr. pp. 952, 1070-71; 1194-98.] (A. pp. 31-32, 53-54, 94-98.) In 1964 Dr. Miller's net income before taxes had dropped from

$27,430.86 before taxes to $15,299.76. [Rep. Tr. p. 939; A. pp. 30-31.] The Millers had debts of $64,000 of which $30,000 was attributable to the recent construction of their new home, the building of which the doctor did not favor, although he went along with it to keep peace in the family. The debts also included a debt of $3,597 on a Mustang automobile. [Rep. Tr. pp. 946-47, 954-57, 1931-33, 953-54.]

Arthwell C. Hayton is an attorney at law with offices at San Bernardino and Loma Linda, residing in Redlands, California. [Rep. Tr. p. 1115.] In 1956, he and his wife lived in the Ontario area and he practiced law in Upland. At that time, Dr. Miller and petitioner moved into the area and they became close friends. Hayton has four children. His 12 year old daughter was a playmate of petitioner's daughter Debra. The two families went to the Seattle World's Fair *together in 1962 or 1963.* [Rep. Tr. pp. 1116-17.] At one point of the trip they rode in Dr. Miller's Thunderbird, and Hayton saw no evidence of an extra can of gasoline. [Rep. Tr. p. 1118.]

Over the past five years, petitioner talked with Hayton quite frequently about getting a divorce from Dr. Miller. *She told him that she never really loved Dr. Miller; that she felt that it was a mistake that they were married in the first place; that she was very young at the time; and that while she had lived with her husband and had children with him that they were never really suited for each other and that she did not feel that she could continue to live with him.* [Rep. Tr. pp. 1119-20; A. pp. 68-69.] Petitioner told Hayton that she was primarily concerned about the fact that if she divorced Dr. Miller, while she thought she could

get along as far as a person, she might not get along financially, and discussed with him whether he thought that she could get child support and alimony sufficient to keep her and support her. [Rep. Tr. p. 1121; A p. 69.]

Retitioner came to Hayton when she was first contemplating building the new home on Bella Vista in Alta Loma. Hayton talked to Dr. Miller about it also. Petitioner told Hayton that Dr. Miller was opposed to the building of their new home; that he was happy where they lived; that he felt they could not afford it, and that he did not want to get into the financial program of such a big project. Petitioner told him that she felt the home that they were living in was not adequate. he said, "All my other friends are having new homes," naming them, "And that is something that I have always wanted, and that's something that I am going to have." [Rep. Tr. pp. 1162-63.]

Erwin Sprengel built the home on Bella Vista for petitioner in the early months of 1964.

Petitioner told Sprengel that she did not want him to discuss the financial problems of the construction with Dr. Miller because they did not see eye to eye regarding the finances, and that if he did betray her confidence, he'd rue the day. [Rep. Tr. pp. 825-26, 842-44, 890-94.]

During the period of construction; petitioner told Sprengel that *she disliked her husband;* that he had high principles and didn't see eye to eye with her financial dealings. On one occasion Sprengel asked her a question, and in reply *she said that she really didn't care what Dr. Miller thought about it; he had cut him-*

self off from her and if he tried to do anything about it, he'd get his. [Rep. Tr. pp. 829-30; A. pp. 3-4.]

Between the end of November 1963 and June 1, 1964, Hayton saw petitioner on many occasions. They went riding in his car together. They went to Palm Springs together. They registered in motels together on two or three occasions, one of which was in June of 1964. [Rep. Tr. pp. 1181-82; A. pp. 92-94.] They first went to a motel in November of 1963 in Arcadia. On that occasion petitioner had asked Hayton to spend the evening with her, and she had asked him to go to the motel. She had asked him to come over to her home, and from there they talked about where they would go. On the occasion that they went to Palm Springs together, Hayton and petitioner were intimate at the Spa Motel. [Rep. Tr. pp. 1190, 1207, 1224; A. pp. 94, 98-99, 101.] Hayton was not in love with petitioner. [Rep. Tr. p. 1226.]

Several Months before Dr. Miller's death, at their beach trailer, Dr. Ford and his wife were discussing with petitioner her relationship with Arthwell Hayton. Dr. Ford advised petitioner that he did not think the romance, if such existed, was sincere on Hayton's part, and to forget about it. *Petitioner said that it was sincere on her part.* [Rep. Tr. pp. 768-78; A. pp. 1-3.]

Eleanor Brookins was Arthwell Hayton's legal secretary for the past 15 years. During the time that preceded June of 1964, petitioner was a frequent visitor at the San Bernardino office, and made frequent phone calls there. [Rep. Tr. pp. 969-70.]

Wenche Berg was Arthwell Hayton's housekeeper from June 7, 1964 on. The house received daily tele-

phone calls from petitioner during that period of time. [Rep. Tr. pp. 997-98; A. pp. 38-39.]

On about April 20 or 21, 1964, petitioner suggested that Hayton divorce his wife and marry her. He told her that he would not divorce his wife. She replied that she was quite persistent and would wait for him. She had called him and had arranged a meeting for lunch at the Holiday Inn. At lunch *she told him that she had definitely decided to divorce Dr. Miller; that she could not live with him any longer; that she had thought about it on other occasions, but had put it off, and that now she had made a decision. She said that regardless of what happened, she was going ahead and file a divorce action and asked him to recommend an attorney.* He recommended Mr. Beloud in Ontario. She said that she had had enough of living with Dr. Miller; that he was completely unhappy and irrelevant in his feelings about her desires for her home that they were building, and that she just could not live with him any longer. [Rep. Tr. pp. 1121-25; A. pp. 69-73.] The conversation is fully set forth in Appendix to the Brief for Respondent at pp. 69-73.

Hayton told petitioner that he was worried that Elaine would find out about petitioner and himself. He told her that Elaine had been upset about anonymous telephone calls that she had been receiving, and that he felt petitioner was responsible for them. [Rep. Tr. p. 1205.]

Petitioner had also told Eleanor Brookins that *she felt that the Haytons were not suited for each other; that petitioner thought she was more suited for Hayton than his wife.* [Rep. Tr. pp. 972-73; A. p. 33.]

A few days after petitioner had the above conversation concerning petitioner divorcing Dr. Miller and

marrying Hayton, Hayton's wife, Elaine, died. Hayton had taken his son Bill and five of his playmates on a boating trip to Catalina, and it was while on this trip that he received word over his radio that his wife had died on May 24, 1964. The Coast Guard flew him home. When he landed at the Tri-City Airfield near Redlands, petitioner met him there, as did his sister and another friend. He was upset and petitioner put her arm around him and offered to drive him home. In the days that followed she helped to take care of his children. She kept the two little children with her until the funeral. Hayton remained home for about three weeks, during which time petitioner came back and forth to the house almost daily, transporting the children. She telephoned frequently during this period. About the 1st of June, Pastor Hassenphlugg of Hayton's church paid him a visit at his office, and they had a talk. That day Hayton telephoned petitioner and told her that he could not see her anymore because he had to preserve his reputation. She insisted that he have "the guts" to tell her in person. [Rep. Tr. pp. 1125-30, 1210; A. pp. 72-76, 99.] The entire conversation is set forth in Appendix to the Brief for Respondent at pp. 74-76.

He met her at Harold's Club after that and told her that he didn't want to see her again. [Rep. Tr. p. 1210; A. p. 99.] A couple of days later be brought petitioner a box of candy and gave her a letter. [Ex. D.] In the letter he apologized for certain undesignated events in the last few days and referred to petitioner as one of his and his wife's closest and dearest friends, as well as kind, generous, warm hearted, and loyal, as well as having many other fine qualities. He indicated that he wanted to be alone to think because of his emo-

tional upset and the vicious and malicious reports. He closed by referring to petitioner as his closest friend. At that time he said that he was sorry that they had had the affair and asked her not to see him any more, and thanked her for the kindness to the children. [Rep. Tr. pp. 1187-89, 1212.]

About that time petitioner telephoned Eleanor Brookins at the law office. She said that she had heard that friends of Hayton in Loma Linda and Redlands had been talking against her to Hayton. She said that she knew that Eleanor didn't have any control over what went on in the Loma Linda office, but she wanted her to do everything she could to keep these people from talking to Hayton in the San Bernardino office. *Petitioner said that she wanted to marry Hayton.* Eleanor Brookins told petitioner that she didn't think there was a chance that Hayton would marry her because she didn't think he cared for petitioner that much and, in addition, he was too bereaved over the death of his wife. *Petitioner replied, "Time will tell." She said in a joking manner that in the meantime Eleanor should not get any ideas about marrying Hayton.* [Rep. Tr. pp. 971-72, 979; A. pp. 32-33, 35.]

About June 5, 1964, Hayton received information that petitioner had been in an automobile accident and was injured, as was her daughter Debra. Petitioner had requested him to come to the hospital and he sent his investigator, Robert Peach, who reported back to him. When she had returned home from the hospital, petitioner telephoned Hayton to ask why he had not come to the hospital to see her. He told her that he would take the case. She asked him to come to the house, and he agreed. That night he and his son Bill

went to petitioner's home and she asked him why he would not come and see her. He replied that he did not want to see her or have any communication between her and himself or his children except to handle the legal matter. [Rep. Tr. pp. 1130-33; A. pp. 76-78.]

During the next two or three weeks, petitioner called Hayton occasionally at his offices, but he was curt with her. In one of these conversations about a week after the visit to her home, petitioner said:

> *"Arthwell, certainly by now any gossip or any thing that anybody may have said at Redlands has died down, and Loma Linda, and I would like to see you. Please see me and please let's go down to the beach together. I am going to be down for a week or so at Eddie Ford's trailer and Yolanda and I am going to be down there, and please come on down and let's spend some time down there together."*

He said:

> "Lucille, I, under no circumstances, want to see you. I have made it plain to you that I do not want to see you socially, and certainly I would not go down to the beach or any other place and meet you." [Rep. Tr. pp. 1133-34; A. pp. 78-79.]

Around the middle of June of 1964, Eleanor Brookins had stopped putting petitioner's calls through to Hayton because he had given her instructions that he did not wish to speak with her or see her. After that date, she received numerous phone calls for Hayton from petitioner. She did not put them through, but did not tell petitioner of her instructions from Hayton.

After a time, petitioner started calling person-to-person. These calls were not put through either. The other girls at the office were instructed that no calls were to be put through to Mr. Hayton without announcing them first. [Rep. Tr. pp. 974-75; A. pp. 34-35.]

During this same period of time, petitioner telephoned Erwin Sprengel on numerous occasions and discussed her personal affairs, particularly her interest in Arthwell Hayton. She continued to call him and discuss her personal interest in Hayton after June of 1964. Petitioner asked him to intercede with Mr. Hayton for her on several occasions. Petitioner told Sprengel that for some time she and Hayton had been close friends; that she admired Hayton very much because of his ability as a practicing attorney; that she enjoyed the same social contacts and activity that he enjoyed. *She told him that she had lost any affection whatsoever for her husband; that she did in fact love Hayton, and circumstances permitting, would like to marry him.* She told him that Mrs. Hayton had come to her on occasions to discuss her marriage problems and that she had given Mrs. Hayton advice. She said that she had been quite close to the Haytons, discussing their problems; that she cared for the children and had interceded in their matrimonial difficulties. She told him that she suggested to Mrs. Hayton that she get a divorce from Mr. Hayton. During the period of time when she was having trouble reaching Hayton at home and at the office, she told him about that fact, and that the girls would not let her through even though she thought he was there. She asked Sprengel to carry messages to Hayton, which he did. He knew that petitioner had filed for divorce against Dr. Miller. The

divorce was filed on July 8, 1964. [Certified copy of complaint, Ex. 44; Rep. Tr. pp. 827-32; A. pp. 3-6.]

Sprengel knew that petitioner resumed living with Dr. Miller after the divorce action had been filed. Petitioner told him, while sitting in a car with him at Newport Beach, *that she had gone back to her husband because, if she could not have Mr. Hayton at least a man with a $25,000 a year income was better than nothing.* [Rep. Tr. pp. 832-33, 909; A. pp. 6-7, 26.]

On June 22, 1964, Hayton had gone out to dinner with petitioner, Mr. and Mrs. Sprengel, and Darlene Nemner. That evening Hayton and petitioner went to a motel and registered under the name "Jack Wardruff." [Rep. Tr. pp. 1181-82, 1215; A. pp. 92-94, 99-100.]

Before the end of June, petitioner came to the back door of Hayton's house and told Wenche Berg, the housekeeper, that she was going to take Hayton's youngest boy, Jeffrey, to the mountains. Wenche Berg knew nothing of such an arrangement beforehand. Petitioner took Jeffrey with her. Hayton was at the office at the time and when he came home that night he asked for Jeffrey, and Wenche Berg told him that petitioner had taken him to the mountains. Hayton did not know that he was going; Hayton had not given petitioner permission to take him to the mountains, and did not know where she had taken him. He had been enrolled in a summer bible school, which he missed. Hayton was upset. He later found out that Jeffrey had been at Harold Lance's mountain cabin. Jeffrey came home about a

week later, and after that Hayton gave Wenche Berg instructions that petitioner was not to be allowed to talk to the children. Petitioner continued to telephone the house after that, however. She was told that she could not talk to the children. She continued to telephone. [Rep. Tr. pp. 998-1000, 1146; A. pp. 38-41, 86.]

In July of 1964, Hayton and a woman companion went to a western party for square dancing. Priscilla (Sandy) Slagel, who was a medical student at Loma Linda University, and a close friend of petitioner, and who had lived at the Miller home when she was not at the university, had driven petitioner to the location of the square dance. She was aware that during the Spring and Summer of 1964, *Petitioner was interested in Hayton.* [Rep. Tr. pp. 983-88, 1134, 1217; A. pp. 35-37, 79, 100.] Hayton and his companion left the party about 10:00 p.m. to go to his house for a swim, but on the way decided to drive to Newport instead, where Hayton had a new 42-foot boat. They were followed there by petitioner and Sandy Slagel. Hayton took the boat out around the island and returned about 45 minutes later He moored the boat in its slip with two lines forward, one on each side of the boat, and left the two aft lines on board. He and his companion remained on board watching television, drinking hot chocolate, and doing some necking for about thirty minutes. In the meantime, petitioner and Sandy Slagel had encountered an elderly lady at the dock with whom petitioner discussed the boat, and the lady suggested untying the boat so that it would bob up and down. She and

petitioner proceeded to untie the boat and then they went back to their car and waited for Hayton to appear. When Hayton came out, the boat was partially out of the slip into the bay, fifty feet out of position. He went forward and jumped to the dock and pulled the boat back into the slip by the boat hook. He noticed that the two forward lines had been untied at the dock. He tied up the boat and drove home. Petitioner and Sandy Slagel followed him. On the way he saw petitioner slumped down in the seat of a Volkswagen with Sandy Slagel driving. They followed him but he lost them by a quick exit from the freeway. He took his companion home and returned to his own house where he found the Volkswagen parked in front of his driveway. [Rep. Tr. pp. *986-91, 1135-43*; A. pp. *36-38, 79-84.*] Petitioner jumped out and came to his car yelling:

> *"You so and so, you had better open this door and let me in."*

Hayton said:

> "Lucille, please don't yell. Don't wake up the neighbors."

Petitioner said:

> *"If you let me in and act civilized, I'll talk to you."*

He opened the door and she got in. He asked her if she had been following him all evening, and she said:

> *"I have, Sonny Boy, and I know exactly everything that you have done."*

He said:

> "Lucille, are you out of your mind? I can't imagine anybody doing something so stupid as that. I can't believe that you really have."

She said:

"Well, if you want to know what you did, I'll tell you."

And she described his whole evening from the time he left home, even to peeking in the windows at the square dance and watching him out on the balcony. He said:

"Lucille, I can't understand this. No normal person would do this. How in the world can you do something like this? Its so silly and stupid."

Petitioner said:

"Well, look, I've tried to be nice to you and I've tried to have you be nice to me. You have been putting me off and you won't let me talk to you and you won't let me see your children or get a hold of you at home or at the office, and this is the only way that I can talk to you."

He said:

"Well, I don't want to talk to you, Lucille. I don't want to see you. If I ever did before, this certainly ends any thought I ever had."

He said, "Please leave." She said:

"Look, Arthwell, I want to tell you something. I have never had any man in my life reject me."

"You are not just about the first one to do it."

Hayton said, "Lucille, get out of this car before I throw you out." Appellant got out and drove away in the Volkswagen. [Rep. Tr. pp. 1143-45; A. pp. 83-86.]

About 9 p.m. on July 29, 1964 petitioner telephoned Hayton at his Redlands home and apologized for her conduct down at the boat. Among other things she stated that she wanted to be nice to him and for him

to be nice to her and asked him to come over to her home that evening. After telling her that he did not want to see her Hayton hung up. She called him again twice that night, endeavoring to get him to come to see her or let her come to see him. She threatened him. He refused to talk to her. She had Priscilla Slagle telephone him urging him to come over to see her warning that she might do something terrible if he didn't. But he still refused. (The entire conversation is set forth in Appendix for the Brief for Respondent at pp. 86-90, 35-36.) [Rep. Tr. pp. 1147-50, 1156-58, 984.]

The next day Hayton gave his secretary instructions to dictate a letter immediately telling petitioner that he did not want to represent her further in any way in connection with her case. After the boat incident he had told petitioner that he did not want to handle the case and suggested that she obtain another attorney, but as of that time she had not done so. Eleanor Brookins wrote, signed, and sent the letter. [Ex. S; Rep. Tr. pp. 975, 1166; A. pp. 34-35.]

Also that next morning Hayton talked to his partner, Erwin Sprengel, his investigator, Robert Peach, and an attorney, Robert Beloud, after which he went to New York with his daughter Terry for about three weeks to attend the NACCA convention. He had planned to go before that date. [Rep. Tr. pp. 1159-60, 1220, 975; A. pp. 90-91, 34-35.] Hayton had his phone disconnected while he was gone and a new unlisted number installed. When Hayton returned from New York, he went on vacation with his children to the beach and on the boat to Catalina. *While he was gone, petitioner did not telephone Hayton's home. When Hayton returned, the telephone calls from petitioner resumed.* On one

occasion a female voice that Wenche Berg did not recognize called and talked with the children, and afterwards Wenche told the children that they should not have talked with petitioner because Hayton had forbidden it. Another time petitioner called and talked to Terry, Hayton's daughter, and told her that she was coming over because her daughter Debra wanted to see her and they would take her out for dinner. Hayton was consulted by telephone and the children were sent to a neighbor's house. *Later petitioner appeared at the house.* Hayton returned to his office the first week in September. [Rep. Tr. pp. 975, 1000-02, 1160-61; A. pp. 34-35, 40-41, 90-92.]

Hayton took his daughter Terry over to petitioner's house on the way to driving her to Rio Linda for enrollment at a school during the first part of September, so that she could say goodbye to Debra Miller. This was the day after petitioner had come to the house to see Terry and Hayton had instructed Wenche to hide the children. Hayton remained in the car when petitioner came out of the house. That was the last time Hayton saw her. [Rep. Tr. pp. 1002, 1161-62; A. pp. 41, 90-92.]

On July 31, 1964, two days after petitioner had spoken to Hayton at his home, she telephoned Erwin Sprengel and talked for almost an hour about Hayton and about a letter she had received from him. Sprengel made a tape recording of that conversation. [Ex. 45.] The conversation was transcribed. [Ex. 46.] In that conversation petitioner urged Sprengle to get Hayton to talk to her, as she knew, "If he talked to me, we could straighten it out," referring to his "hate" for her. She said that Hayton would "weaken" if he saw

her and that "He feels like I am a threat to his stubbornness." Although she told Sprengle that Hayton's emotional entanglement with her was over after the boat incident and after she went back to her husband, her entire conversation with Sprengle indicates that she still wished such entanglement. The entire conversation is fully set forth in the Appendix to the Brief for Respondent at pp. 7-26. [Rep. Tr. pp. 858-880.]

In the latter part of August of 1964, petitioner had a telephone conversation with Marilyn Sprengel, the wife of Erwin Sprengel, concerning petitioner's relationship with Hayton. In that conversation, petitioner told Mrs. Sprengel, in regard to that relationship, that petitioner was holding the trump card. [Rep. Tr. pp. 923-25; A. pp. 26-27.]

On September 22, 1964, Mrs. Sprengel had another conversation with petitioner on the telephone wherein petitioner asked her if she would be home that afternoon, inasmuch as she had a letter she wanted to show her. Later that afternoon, petitioner came over and showed a letter to Mrs. Sprengel. *Petitioner told Mrs. Sprengel that under certain circumstances, she would have copies made of the letter and give them to various* individuals, but if she married Hayton she *would destroy the letter. Petitioner told Mrs. Sprengel that in spite of the things that had recently taken place, that she still loved Hayton; that this was not the sort of thing that you could just turn off.* Mrs. Sprengel believed that during the same conversation, petitioner also said that she would never marry Hayton because he was no good. In the middle of September, petitioner told Mrs. Sprengel that Dr. Miller had threatened to commit suicide by driving his car to the mountains and

driving off a cliff. [Rep. Tr. pp. 930-36; A. pp. 27-29.]

On September 30, 1964, Roy Lyle James, a college instructor, was in the vicinity of the Allen Family shoe store in Montclair with Allen and Lorraine Habekost. At that time, petitioner was also present and brought up the subject of autopsies. She asked, "if a coroner's investigation produced a given statement, is it possible that that statement when entered on the autopsy report could have been changed?" [Rep. Tr. pp. 1954-55, 1966-67.]

Sergeant William Paterson was present when petitioner was arrested at her home at 1:30 p.m. on October 8, 1964. At that time he advised her of her rights. He told her that she did not have to talk with them if she did not want to; that she could remain silent and that she had a right to consult with an attorney before she talked with them. She was brought to the County Jail and booked. Afterwards, she was permitted to talk with Mr. Ward, her attorney, for at least ten minutes. Paterson examined petitioner's purse and wallet. Inside the purse he found a business card of Arthwell C. Hayton, and two place cards with Christmas decorations on them, one with the name Arthwell and the other with the name Lucille. [Ex. 47; Rep. Tr. pp. 1017-19; A. pp. 48-50.]

At 3:00 p.m. that afternoon, Donna M. Carter of the San Bernardino County Jail, women's division, booked petitioner into the jail. Petitioner complained of no injuries, although they did have some conversation. Carter saw no injuries on petitioner, and took a photograph of petitioner at 7:00 p.m. [Ex. 34.] Carter noticed that petitioner had little or no eyelashes. She saw

nothing noticeable about petitioner's hair. She did not recall any odor of burnt hair. Petitioner did not appear to be distraught at all. [Rep. Tr. pp. 685-88.]

On October 8, 1964, Anthony Longhetti, the criminalist for the San Bernardino County Sheriff, made a microscopic examination of the hair specimen taken from petitioner's head on that date and determined that at least twenty of the head hairs showed swiveling and beaded ends characteristic of singed hair. On October 11, between 6 and 7 p.m., he examined the hair on petitioner's right forearm and hand, and found some singed hairs on the outer aspect of the right arm about two inches behind the wrist. No other singed hair was noted either on the right arm or hand, or on the left arm or hand. [Rep. Tr. pp. 143-46.]

On October 21, 1964, Longhetti received from Edward P. Foley, defense counsel, a bag of clothing worn by petitioner on the night of the death of Dr. Miller consisting of a pair of capries, a blouse and a pair of yellow sandals. Examination and tests of the clothing revealed no evidence showing burning, singeing or petroleum derivatives. [Rep. Tr. pp. 146-51.]

Petitioner's Statements.

Around 9:00 p.m. on the night of petitioner's arrest, Sergeant William Paterson had a conversation with her in the County Jail. He advised her that she did not have to talk to him if she did not want to; that she could remain silent; that she had a right to consult an attorney before making a statement to him. He reminded her that she had been conferring with attorneys, and that if she wished to follow their wishes, it would be all right, for she did not have to talk to

him if she did not wish to do so. Petitioner said that she would rather talk to him than be in the jail section. [Rep. Tr. p. 1020.]

Paterson asked petitioner what were her activities on the evening in question. Petitioner said that she had left the house earlier in the evening to go downtown. It was about 7:30. She and Dr. Miller had an accident on the way in which their vehicle struck a dog. They stopped and checked for the ownership of the dog, and then proceeded on downtown. They went to a serve-yourself dry cleaning establishment. While waiting for their clothing, Dr. Miller went into a liquor store and purchased a coke, then returned to the car. They picked up their cleaning about 9:00 p.m. and returned home. About 11:00 p.m. she and Dr. Miller lay on the couch and watched a movie about spies and investigators. After the movie was over, Dr. Miller asked for some hot chocolate. She looked in the refrigerator and told Dr. Miller that there was not enough milk for both him and the children's breakfast in the morning. Dr. Miller said, "Let's go get some." They went down to a market that remained open until midnight, but arrived a couple of minutes after midnight and the market had already closed. She saw two men standing inside by the cash register, one wearing a white shirt. They went on down to the Mayfair Market where she purchased two one-half gallon cartons of milk for 96 cents, using a one dollar bill. She returned to the car and drove up Sapphire, making a right turn on Banyan. After traveling about a third or quarter way down Banyan, east of Sapphire, something went wrong with the steering, or she had a blow-out. She steered the car to the side of the road and it went into a bank.

Dr. Miller was wrapped in a blanket with his head against the window on a pillow. She had thought that when the car went into the bank, he hit his head. He said something like "Oh." She recalled an orange-red flame behind Dr. Miller from the floor up to the roof of the car. She became frightened and jumped out. She ran around to the right side of the vehicle and tried to open the door, but it was locked. She picked up a rock and threw it through the right rear window and then found a stick with which she tried to push Dr. Miller out of the vehicle. Paterson asked her why she was trying to push him out of the closed door, and she didn't answer. She went looking for help, traveling east on Banyan, and saying to herself, "No one will help me." After going on Banyan for a distance, she recalled that there was a house on Sapphire, and she went there. She remembered a dog barking and a woman coming to the door. Paterson asked her if she had any conversation with the woman, and she said: "You will have to talk with the woman, that she made all the phone calls." She said that her hair had been singed and that a white bandana she was wearing also had been burned. [Rep. Tr. pp. 1020-24.]

When Paterson had brought petitioner to the County Jail on that afternoon, she said that she threw the rock through the right rear window. She also brought up the subject of the autopsy by asking if there was enough left to perform an autopsy. When Paterson told her that there was, she said that the autopsy results would be in her favor. She said it repeatedly. [Rep. Tr. p. 1872.] After finishing the conversation that commenced around 9:00 p.m. on the night of petitioner's arrest, Paterson took petitioner to the interview room of

the Sheriff's Office and tape recorded another statement. [Ex. 48.] Again, petitioner said that she would rather talk with Paterson than be upstairs. The entire tape was played for the jury. [Rep. Tr. pp. 1030-78.]

In that conversation petitioner said, "Okay. You'll check me out, to see if my story is straight." [Rep. Tr. p. 1030.] She told Sergeant Paterson that she and Dr. Miller were going to have some hot chocolate but that they were out of milk and he suggested that they go get some. She told Sergeant Paterson that Dr. Miller had said that he was dizzy but that she did not know if Dr. Miller had taken any medicine. She said that there was no Psychopal (PAC) in the house but that they did have Fiorinal. [Rep. Tr. pp. 1033-35.] She told Sergeant Paterson how her attorney friend, Harold Lance, had been telling her that the authorities were suspicious about Dr. Miller's death and among other things she said:

> "But I said, I said to Harold, I said, and I asked him, I hounded him. He really didn't want to tell me, you know, Lance had no idea—even how they pinned this thing on me, or even tried to, and he didn't want to talk about it, you know, I badgered him, I said, please tell me some of the things that they come up with to make me look guilty in this, and he said, well, he said, you know, Cork could have been dead before that fire burned, and I said, 'Well, they can tell, the time of death,' and he said I don't think they can and I said, well, how would I have done it, and he said well, they were looking for, you know—a blow on the head or a bullet, and I said, 'Well, Harold, as I said, that autopsy will be completely in my favor,' . . ." [Rep. Tr. pp. 1056-58; A. p. 50.]

She told Sergeant Paterson that she had known Hayton about a year and had gone with him approximately six months prior to August. She told him that she did not love her husband but certainly had something for him. She said, "I felt like Cork was rejecting me for years." She said that they were married 15 years and that she was rejected for 14 of them. She said that her husband had lived with the knowledge of her relationship with Hayton for years. [Rep. Tr. pp. 1058-61; A. pp. 50-53.] She told Sergeant Paterson, "[B]asically, I've always kind of just lived my life the way I wanted to, and if you don't like it, you can take off." [Rep. Tr. p. 1066.]

She told Paterson that Dr. Miller had over $100,000 in life insurance because some of it was double indemnity. [Rep. Tr. pp. 1070-71; A. pp. 53-54.]

In rebuttal, Sergeant Paterson testified that on one of the evenings during the trial he drove up to the scene of the Miller Volkswagen fire with Inspector Precy Sellas. He said there was a full moon and he drove using just his parking lights. They did not light up the road ahead. It was extremely hazardous driving up 19th to Sapphire and to Banyan. He was constantly fighting the wheel to keep the car on the road itself. It was extremely dark on Sapphire though less so on Banyan. Yet on Banyan it was still dark enough to cause concern. There were no street lights on Sapphire or Banyan. [Rep. Tr. pp. 1868-69.] At that time he took some photographs of Donna Carter down below the retaining wall [Exs. 53, 54, 55], and on the other side of the street. She was about petitioner's size. [Rep. Tr. pp. 1870-71.]

On October 9, 1964, Peggy Fisk was booked into the County Jail as a prisoner. However, she was employed by San Bernardino County to work under cover and pretend to be a prisoner. Her instructions were only to listen. She was placed in petitioner's cell and became acquainted with her. Petitioner talked to her about herself, her reason for being in jail, her husband, and her domestic problems. [Rep. Tr. pp. 1098-99, 1102, 1112; A. pp. 54-55, 58, 66.] Fisk did not tell petitioner that she was a law enforcement agent, but did tell her that she should discuss these things with her attorney. She did not tell petitioner that she had a right to have an attorney present when she talked to Fisk. [Rep. Tr. p. 1100; A. p. 56.] Petitioner told Fisk that she and her husband had filed for divorce at one time but had reconciled before his death. She said that she had not loved her husband but that she had respected him. She said that she had always loved Mr. Hayton and still loved him. She said that as soon as this mess was over that she planned to take her daughter Debbie and the two boys away to Europe with the insurance money. She said that she would receive over a hundred thousand dollars in insurance because of the accidental death. [Rep. Tr. pp. 1100-1101; A. pp. 56-57.]

Fisk was not sure as to the date that she was released from the county jail but it was not later than October 15, 1964. [Rep. Tr. p. 1103; A. p. 59.] From time to time she made oral reports of what she heard to vice officer Lieutenant Shepherd who came to see her. She made no written notes. Her conversations with petitioner were not tape recorded or bugged in any way. She made no written report of the statements of pe-

titioner. A written report of Petitioner's statements based upon Fisk's oral reports was prepared by a secretary of the vice section on October 12, 1964 and partly on October 14, 1964. [Rep. Tr. pp. 1103, 1108, 1111, 1113; A. pp. 59, 63, 66-67.] The record is devoid of a single instance in which Fisk asked petitioner a question or said anything to her which induced any of the statements introduced into evidence. Nor does the record show that any of the statements were made after October 12, 1964. [Rep. Tr. p. 1098-1114; A. pp. 54-68.]

On October 13, 1964, a complaint charging petitioner with murder was filed in the Municipal Court of San Bernardino Judicial District, County of San Bernardino, State of California. Petitioner was arraigned on that date and a preliminary hearing was set for October 23, 1964. (Appendix.) On October 20, 1964, an indictment charging petitioner with murder was filed in the Superior Court of the State of California. [Clk. Tr. pp. 1-2.] On October 21, 1964, the complaint in the Municipal Court was dismissed. (Appendix.)

DEFENSE.

Petitioner denied all guilt. She explained her obtaining the barbiturate pills as necessary for her husband's illness. She recounted the details of the night in question. About 7:30 p.m. the doctor drove petitioner in the Volkswagen intending to go to a dry cleaners in Pomona. In route, their car killed a large German Shepherd dog and damaged the left front light of the car. The accident upset the doctor because this was the third car of his that had been damaged in four months. Nevertheless, he drove to the hobby shop where peti-

tioner purchased glue for the boys' model toys. Then they went to the cleaners. He complained of a headache and asked petitioner to drive on the return home. At home, the doctor reclined on a couch and watched television with a pillow under his head and a blanket over him. Petitioner joined him under the blanket. When the movie was over, the doctor asked petitioner to fix him some hot chocolate. She discovered that there was only about one-eighth gallon of milk left in the refrigerator. She told the doctor that this would not be enough for breakfast if she used any of it for hot chocolate. He suggested that they drive to Woody's Market and get some. The doctor took the pillow and blanket to the Volkswagen, which the doctor had rented. They did not take her car a Mustang with air-conditioning. The doctor climbed into the right front passenger seat, wrapped the blanket around himself and leaned his head on the pillow against the window. Petitioner drove and, noticing that her husband was leaning against the door, reached over and locked it. Woody's Market was closed. They then decided to go to the Mayfair. This was a 20 mile round trip. Petitioner went into the market with her husband's wallet containing 70 to 100 dollars and brought out two half gallon cartons of milk, placing them on the floor of the rear passenger compartment of the Volkswagen. She placed the wallet under her leg and never saw it again. She did not notice the gasoline can. She was driving on Banyan at 30 to 40 miles an hour wearing dark tinted glasses. It was not the most direct route home nor the one the family used. When she felt the steering wheel pull, as in a blowout, she immediately pulled in the opposite direction. The car went out of

control and landed on the shoulder without the application of brakes. She remembered in a sort of subconscious way, wheels spinning, then a large flame behind her. She panicked and the next thing she knew she was standing outside the open door of the car which was in flames. There were too many flames and it was too hot to try to pull the doctor out the door. She ran around the car and tried to open the door on the passenger side. Then she remembered she had locked it. Her next thought was to get a rock and throw it through the window. She found one but could not dig it out of the sand. She found another and threw it through the front window. The heat was so intense that she could not get the door open. She went down the bank looking for a stake with which to push her husband out of the car but could not find one large enough. She found one too small but nevertheless she hurried with it back to the car. She doesn't know what she did with the stake, possibly she dropped it. She ran in the direction of a car passing the nearby corner. It kept going. She then remembered the home of Mrs. Bridge at that corner. The house was unlit and she couldn't find it. She turned and went running in another direction. As she passed the burning Volkswagen, she stopped and she saw her husband. He was black. She then saw the gasoline can. She ran to Mrs. Swenson's house some distance away. [Rep. Tr. pp. 1622-62, 1349-53, 1702-1769, 1359-60.]

Petitioner testified on cross-examination that she wanted to marry Hayton before the boat incident but after that she stopped. She was in love with Hayton and wanted to marry him when he called her on May 24, 1964 about his talk with his minister. [Rep. Tr.

pp. 1782-83; A. p. 101.] The affair started with Hayton in December of 1963. [Rep. Tr. p. 1784; A. p. 101.] During the end of the period when she was going with Hayton, she wanted to be unmarried to Dr. Miller. [Rep. Tr. p. 1786; A. p. 102.] There were times during the marriage when petitioner wanted to be unmarried to Dr. Miller. [Rep. Tr. p. 1787; A. p. 102.] Petitioner was still in love with Hayton until the death of Dr. Miller. [Rep. Tr. p. 1788; A. pp. 102-03.] Petitioner felt that Dr. Miller had rejected her for 14 of their 15 years of marriage. [Rep. Tr. p. 1790.]

Accidental fire theories were presented by the defense through expert testimony but these theories were contradicted by the prosecution's experts as being highly unprobable in view of the condition of the Volkswagen. [Rep. Tr. pp. 662, 671, 677-79, 1536-1603, 1805-1844, 1847-48, 1853, 1878-1888, 1899-1902, 1971-1972, 1974-1977, 1991-1993.]

SUMMARY OF ARGUMENT.

There was no violation of the constitutional rights to counsel and against self-incrimination in the introduction of petitioner's jail cell statement to the police undercover agent under the rules in *Massiah* and *Escobedo* because the statements were made prior to any formal charging pleading in a state court; there was a total absence of a process of interrogation lending itself to eliciting incriminating statements and petitioner was not denied a requested opportunity to consult with her lawyer. This is a claim that would be legitimate only if it could be shown by appropriate reference to the record that petitioner's statements were the product of a process of interrogation under the broader protection

of the *Miranda* case which due to the date of the instant trial is not herein applicable.

As the law stood at the time the undercover agent was placed in petitioner's jail cell, the law enforcement authorities had sufficient grounds for a good faith belief that there was a right to place an undercover agent in a jail cell for the purpose of overhearing petitioner's statements provided no attempt was made on the part of the undercover agent to elicit statements from petitioner. The undercover agent was specifically instructed only to listen to petitioner and the prosecuting attorney in good faith believed that the statements were admissible as having been voluntarily made in spontaneous form, without any attempt to elicit them.

Petitioner intentionally waived the right to complain about the introduction of her statements to the undercover agent when she did not object to the testimony in a deliberate attempt to both inject constitutional error in the case and to place before the jury, at a strategic time, testimony entirely consistent and in support of the defense. In California where the decision to waive objection to the introduction of statements of the accused can be shown by the record to be attributed to a tactical decision by trial counsel the stratagem will be deemed a waiver of the objection. The Federal courts will deny the defendant relief if the State courts refuse to entertain Federal claims on the merits or a defendant for a strategic and tactical reason deliberately bypasses State procedures.

The introduction into evidence of petitioner's cumulative statements under the circumstances of this was harmless in that it dod not result in the denial of a constitutional right basic to a fair trial and the evi-

dence introduced could not have contributed to the conviction. Although the lack of the assistance of counsel at certain stages of the prosecution must almost invariably deny a fair trial, for example, at the trial itself, at some forms of arraignment or on appeal, the secret or in-custody interrogation situation and identification confrontation situations do not invariably deny a fair trial in the absence of counsel. Nor does the lack of protection of the Fifth Amendment privilege against self-incrimination in the above situation, absent a coerced confession, invariably prevent a fair trial.

Coerced confessions are excluded from evidence because of a complex of values including the likelihood that the confession is untrue, the preservation of the individual's freedom of will and the abhorrence of society to the use of involuntary confessions. In the area of coerced confessions and the assistance of counsel both at the trial and on appeal the principle applied goes to the fairness of the trial—the very integrity of the fact finding process and averts the pure danger of convicting the innocent. The exclusionary rules of *Massiah, Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogations but encompass situations as in our case in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion. Statements obtained in those circumstances may well be voluntary, highly reliable and relevant. Furthermore, the law on coerced confessions is available to persons as a safeguard.

The conclusion is reached that all petitioner attacks in this case is the admissibility of evidence, the reliability and relevancy of which is not questioned and which

had no effect on the outcome. Petitioner finds prejudice to her case in her admission to the undercover agent that she had not loved her husband but had respected him, that she had always loved Arthwell Hayton and still loved him because it made the prosecution's entire case seem credible. This statement was not a confession nor was it an admission that implicated her in crime. It was no more than a statement of fact that she had a motive to murder her husband to overcome the assumption that a woman loved her husband and would not murder him. In the posture of the defense that petitioner had indeed loved Arthwell Hayton and had an adulterous affair with him but no longer intended to marry him, the admission was of no consequence. The question was whether before the murder she had abandoned the idea of marrying Arthwell Hayton. The crucial point is that petitioner did not admit to the undercover agent that she intended to marry Hayton now that her husband was dead which was the only contested question on motive in issue at the trial. Under these circumstances the introduction into evidence of petitioner's unelicited pre-indictment admissions did not affect the outcome of the trial.

Under some circumstances, as in the present case, the introduction into evidence of statements obtained from a defendant while in custody may be harmless provided they are not confessions which are necessarily prejudicial. There is strong justification for treating involuntary confessions in a class by themselves and refusing to inquire whether in rare cases whether their admission into evidence had no bearing on the results. Almost invariably a confession will constitute persuasive evidence of guilt and it is therefore usually ex-

tremely difficult to determine what part it played in the securing of the conviction.

An admission such as the one in the instant case may be only a relatively insignificant part of the total evidence and have no effect on the outcome of the trial. The basic purpose of the exclusionary rule is to deter unconstitutional methods to law enforcement. A reversal for the admission of illegally obtained evidence without regard for prejudice when there is compelling legally obtained evidence of guilt constitutes nothing more than a penalty not for the officers illegal conduct in securing the evidence, but solely for the prosecutor's blunder in offering it in the trial court and the trial court's error in admitting it. The exclusionary rule so rigidly administered could defeat itself.

Judicial experience in California has shown that where a defendant's testimony or other evidence is virtually identical with extra-judicial statements of the defendant introduced into evidence and it is shown that the introduction of the extra-judicial statements as in the instant case played no part in causing the defendant to take the witness stand, no harm can be found in the introduction into evidence of the extra-judicial statement. It is then clear beyond a reasonable doubt that there is no possibility the evidence could have affected the outcome.

The compelling reasons for the prospective application of constitutional rules of criminal procedure are equally persuasive that a harmless error rule should be applied to any constitutional rule of criminal procedure that of necessity should be applied prospectively. In the area of in-custody interrogation compelling argument has resulted in the adoption of prospective ap-

plication of the *Escobedo* and *Miranda* rules and we submit that it logically follows that a harmless error rule be applied to those rules.

There will be no inordinate difficulty in the application of a harmless error rule to admissions for the burden to establish beyond a reasonable doubt that the admission of evidence could not have affected the outcome is upon the shoulders of the prosecution. Once that burden has been met the lack of prejudice will be self-evident. It is reasonable to distinguish between admissions and confessions for the purpose of determining harmless error because that is a factual distinction as to the extent of the incriminating effect of a statement. Entirely different considerations compel the denial of any distinction between admissions and confessions for the purpose of determining error.

At the time that petitioner made her jail cell statements to the undercover agent, the concept of *Massiah* and *Escobedo* were in their infancy and their implications were not clearly foreshadowed. Under these circumstances, there was no prosecutorial misconduct in the instant case. The application of the harmless error rule to the evidence of petitioner's jail cell statements will serve the useful purposes of that rule and will not impair the deterrent effect of the exclusionary rules of *Massiah* and *Escobedo*.

ARGUMENT.

I.

THERE WAS NO VIOLATION OF THE CONSTITUTIONAL RIGHTS TO COUNSEL AND AGAINST SELF-INCRIMINATION IN THE INTRODUCTION OF PETITIONER'S JAIL CELL STATEMENTS TO THE POLICE UNDERCOVER AGENT.

Petitioner contends that there can be no dispute about the unconstitutionality of the manner in which the undercover agent obtained petitioner's statements. She contends that the statements were obtained in violation of the rules set forth in the cases of *Massiah v. United States,* 377 U.S. 201 (1964), and the case of *Escobedo v. Illinois,* 378 U.S. 478 (1964). The record fails to establish that the undercover agent obtained statements from petitioner in violation of *Massiah* and *Escobedo.* Furthermore, petitioner intentionally waived the right to complain about the introduction of her statements when she did not object to the testimony in a deliberate attempt to both inject constitutional error in the case and to place before the jury, at a strategic time, testimony entirely consistent and in support of the defense. In any event, the testimony of the undercover agent was merely cumulative of evidence already properly admitted and conceded to be true both in her testimony and in the argument of counsel. The evidence was harmless beyond any reasonable doubt for it dealt in total with a subject that was not in issue between the prosecution and the defense *i.e.,* that petitioner was the beneficiary of life insurance on the life of her husband and loved a man other than her husband. In fact, the Fourth District Court of Appeal in effect held that it did not have the slightest idea that petitioner had been injured by the introduction of her statements to the undercover agent.

A. The Circumstances Surrounding the Acquisition and Introduction of Petitioner's Jail Cell Statements Demonstrates the Inapplicability of Massiah and Escobedo.

Petitioner was arrested at about 1:30 p.m. on October 8, 1964, the day of the homicide. At that time she was advised of her rights in that she was told that she did not have to talk to the police if she did not want to; that she could remain silent and that she had a right to consult with an attorney before she talked to the police. She was brought to the County Jail and booked. Afterwards she was permitted to talk with Mr. Ward, her attorney, for at least 10 minutes. [Rep. Tr. pp. 1017-1019; A. pp. 48-49.]

About 9:00 that evening, petitioner had a conversation with Sergeant William Paterson in the County Jail. He advised her that she did not have to talk to him if she did not want to; that she could remain silent; that she had a right to consult an attorney before making a statement to him. He reminded her that she had been conferring with attorneys, that if she wished to follow their wishes, it would be all right, for she did not have to talk to him if she did not wish to do so. Petitioner said that she would rather talk to him than be in the jail section. [Rep. Tr. p. 1020.]

On October 9, 1964, Peggy Fisk was booked into the County Jail as a prisoner, however, she was employed by San Bernardino County to work undercover and to pretend to be a prisoner. Her instructions were only to listen. [Rep. Tr. pp. 1102, 1112; A. pp. 58, 66.] She was placed in petitioner's cell and became acquainted with her. Petitioner talked to Peggy Fisk about herself, her reason for being in jail, her husband, and

her domestic problems. [Rep. Tr. pp. 1098-1099; A. p. 55.] Peggy Fisk did not tell petitioner that she was a law enforcement agent, but did tell her that she should discuss these things with her attorney. She did not tell petitioner that she had a right to have an attorney present when she talked to Peggy Fisk. [Rep. Tr. p. 1100; A. p. 56.] Petitioner told Peggy Fisk that she and her husband had filed for divorce at one time but had reconciled before his death. She said that she had not loved her husband but that she had respected him. She said that she had always loved Mr. Hayton and still loved him. She said that as soon as this mess was over that she planned to take her daughter Debbie and the two boys away to Europe with the insurance money. She said that she would receive over a $100,000 in insurance because of the accidental death. [Rep. Tr. pp. 1100-1101; A. pp. 56-57.]

Peggy Fisk was not sure as to the date she was released from the County Jail but it was not later than October 15, 1964. [Rep. Tr. p. 1103; A. p. 59.] From time to time she made oral reports of what she heard to Vice Officer Lieutenant Shepherd who came to see her. She made no written notes. Her conversations with petitioner were not tape recorded or bugged in any way. She made no written report of the statements of petitioner. A written report of petitioner's statements based upon Peggy Fisk's oral reports was prepared by a secretary of the Vice Section on October 12, 1964 and partly on October 14, 1964. [Rep. Tr. pp. 1103, 1108, 1111, 1113; A. pp. 58-59, 62-63, 65-67.] The record is devoid of a single instance in which Peggy Fisk asked petitioner a question or said anything to her which induced any of the statements introduced into

evidence. Nor does the record show that any of the statements were made after *October 12, 1964.* [Rep. Tr. pp. 1098-1114; A. pp. 55-68.]

On October 13, 1964, a complaint charging petitioner with murder was filed in the Municipal Court of San Bernardino Judicial District, County of San Bernardino, State of California. Petitioner was arraigned on that date and a preliminary hearing was set for October 23, 1964. (Appendix documents.) On October 20, 1964 an indictment charging petitioner with murder was filed in the Superior Court of the State of California. [Clk. Tr. pp. 1-2.] On October 21, 1964, the complaint in the Municipal Court was dismissed. (Appendix documents.)

Petitioner testified that she had a love affiar with Arthwell Hayton which started the first part of December, 1963. She had known him for some years before that time. [Rep. Tr. p. 1784; A. p. 101.] Toward the end of the affair petitioner wanted to be unmarried to her husband, the victim. [Rep. Tr. p. 1786; A. p. 102.] She had felt that way on occasion in the past. [Rep. Tr. p. 1787; A. p. 102.] She testified that she loved Arthwell Hayton up until the minute her husband was gone but that she had lost interest in marrying Arthwell Hayton at the time she had followed him when he had taken another woman to his boat. She testified that at the time of the trial she did not love Arthwell Hayton, which was logical after he had testified against her. [Rep. Tr. p. 1788; A. pp. 102-103.] Solely on the issue of motive and before the undercover agent took the witness stand the prosecution had already proved that petitioner's motive had been to get rid of her husband so that she could be free to marry

the man she loved. While she waited for him, she did not want to have money problems; thus the insurance proceeds, in excess of $100,000, were an additional motivating factor. The underlying motive for the murder was shown to be the fact that petitioner was a selfish and avaricious woman who had long before lost all love and interest in her husband and the life he had provided her. She wanted another man's love, money, social status, prestige, elegant surroundings, and association with wealthier people.

There had been testimony by Walter R. Nourse, the family accountant, that during 1964 the victim's income had been $15,299.76 after business expenses [Rep. Tr. p. 940; A. p. 31], and that in 1963 he had talked over insurance on the victim's life with petitioner. [Rep. Tr. p. 952; A. pp. 31-32.] There was testimony that petitioner told Erwin Sprengel, a business associate of Arthwell Hayton, that she disliked her husband and that if he interfered with her new house plans he would "get his." [Rep. Tr. pp. 829-830; A. pp. 3-5.] Sprengel testified that within three months of the murder petitioner told him that she had lost any affection whatsoever for her husband and instead loved Arthwell Hayton and wanted to marry him. [Rep. Tr. pp. 827-832; A. pp. 3-6.] Sprengel testified that after having filed for divorce and separated from her husband petitioner said that she resumed living with him only for the money he could earn. [Rep. Tr. pp. 832-833, 909; A. pp. 6-7, 26.] There was testimony that in late August, a little over a month before the murder, petitioner told Erwin Sprengel's wife Marilyn that she had the trump card over Arthwell Hayton in their relationship. [Rep. Tr. pp. 924-925; A. p. 26.] On Sep-

tember 22, 1964, two weeks before the murder, petitioner told Mrs. Sprengel that in spite of the things that had recently taken place, that she still loved Arthwell Hayton, and that this was not the sort of thing that you could just turn off. [Rep. Tr. pp. 930-935; App. pp. 26-29.]

There was testimony that petitioner told the investigating officer that she had gone with Arthwell Hayton about six months; that she had discussed this romance with her husband; that she did not love her husband; that he had rejected her for years; and that he had lived with the knowledge that she loved Arthwell Hayton. [Rep. Tr. pp. 1058-61; A. pp. 50-53.] She told that investigating officer that she knew her husband had over $100,000 in life insurance some of which was double indemnity and that she was the beneficiary. [Rep. Tr. pp. 1070-1071; A. pp. 53-54.]

After the brief testimony of the undercover agent to the effect that petitioner had not loved her husband but had respected him, that she had always loved the other man and still loved him, and that as soon as this mess was over that she planned to take her daughter Debby and the two boys away to Europe with the insurance money of over $100,000 because of the accidental death [Rep. Tr. pp. 1098-1101; A. pp. 54-57], there was further testimony on this subject from civilian witnesses. Harold J. Lance, petitioner's attorney, testified that she was the beneficiary of nearly $100,000 in life insurance on the victim's life much of which was double indemnity. [Rep. Tr. pp. 1194-1198; A. pp. 95-98.]

Arthwell Hayton, the other man, testified that earlier in the year she had told him that she had never loved

her husband, that her marriage was a mistake, and that she did not want to live with him anymore. Hayton was a lawyer. [Rep. Tr. pp. 1119-1120; A. pp. 68-69.] He testified on cross-examination by defense counsel that they carried on a motel affair, the last time having been three months before the murder. [Rep. Tr. pp. 1181-1182; 1207; A. pp. 92-94, 99.] He testified on direct examination by the prosecution that about six months before the murder she proposed marriage to him as soon as they could divorce their respective mates. [Rep. Tr. pp. 1121-25; A. pp. 69-73.] He testified that he declined to marry her but that she persisted in the months that followed (his wife having conveniently died a few days after petitioner's illicit proposal of marriage). [Rep. Tr. pp. 1125-1134, 971-979; A. pp. 32-35, 72-79.] Petitioner continued to pursue Hayton with loving attention and with assistance with his children in his time of grief. She did not deny to Hayton that she had told people that Hayton was going to marry her and move to her house. Her activities were noticed by the community; and Hayton, to preserve his reputation, decided to break with her. Petitioner was furious. The obstacle to her plan was an unwanted and unloved husband. Petitioner called Hayton's secretary to tell her to shut off the phone calls that were advising Hayton against her and she told the secretary that she intended to marry Hayton. When the secretary suggested then that Hayton did not care that much for her and was grieved over the death of his wife, petitioner said, "Time will tell," and that in the meantime the secretary should not get any ideas about Mr. Hayton. [Rep. Tr. pp. 971-972, 979; A. pp. 32-33, 35.] Petitioner had been involved in an automobile accident and asked Hayton, to take her case. She used this de-

vice to have him come over to her house, but he still refused to renew the affair. Petitioner waited for the community furor to calm down and then she asked Hayton to come to her. He again refused, but she bided her time and eventually he did come to her and he weakened to her charm on June 22, 1964, when they went to a Palm Springs motel and were intimate. [Rep. Tr. pp. 1130-1134, 1182-1183, 1215; A. pp. 76-79, 94, 100.] From this point on, it was clearly shown by petitioner's statements that she believed that if she could get Hayton to meet her, she could control him through sex. [Rep. Tr. pp. 858-866; A. pp. 10-16.] During this period after Hayton broke off the affair petitioner telephoned him constantly to establish contact, but he was either curt with her or would not talk to her at all. She maintained contact with him through his children and friends. She pumped their mutual friend, Erwin Sprengel, for information about him and asked Sprengel to take messages to him telling Sprengel that she loved and wanted to marry Hayton. [Rep. Tr. pp. 827-32; A. pp. 3-6.]

Petitioner filed for divorce July 8, 1964. Hayton began to show interest in other women, and petitioner's reaction was outrage and foolish retribution when she followed Hayton when he was on a date with another woman and tried to wreck his boat with him and his date aboard. It gave her an opportunity to once again get close to him when she waited outside his home for him to return from the date. At that time she expressed her jealousy and the intention to never be cast aside by him. She revealed her vicious capabilities by threatening to expose him to public ridicule through the disclosure of his immorality. [Rep. Tr. pp. 983-988, 1134-1135, 1217; App. pp. 35-38, 79, 100.]

Toward the end of July, a little over two months before the murder, when the friction between Hayton and petitioner had had a chance to cool down, she once again approached him with repentance and sweetness on the telephone. When this tack was unavailing and she was again rejected, she became furious and resorted to the most vile of threats to expose Hayton to the community. [Rep. Tr. pp. 1147-1158, 984; A. pp. 35-36, 86-90.] Petitioner attempted to have further blackmail threats passed to Hayton through Sprengel when she revealed a tape recording she had made in Hayton's Cadillac on one of their clandestine dates and other "incriminating" evidence, as well as the threat of an outraged husband's vengance. She told Sprengel that she did not want Hayton to hate her, and that if she could talk to him she could soothe him and he would weaken. [Rep. Tr. pp. 853-879; A. pp. 9-26.]

In light of this damning evidence on the issue of motive to be rid of her husband, the brief direct testimony of the undercover agent, occupying one page of the Reporter's Transcript, pales and is placed in its proper perspective in the case. The testimony was of minor significance on a matter that was not even in issue in the case. The issue was not whether petitioner loved Arthwell Hayton but whether she had an interest in marrying him at the time that her husband died. Her emotional entanglement with Hayton was admitted and utilized by the defense in argument to demonstrate her innocence not her guilt. [Rep. Tr. pp. 2174, 2176, 2181-2185, 2238-2239, 2243-2245; A. pp. 121-131.]

Defense counsel argued that appellant had an adulterous affair with Arthwell Hayton and was in love with him up until the time of her husband's death.

It was argued that at the time of her husband's death petitioner had lost any interest in a marriage with Arthwell Hayton, however. Defense counsel used all of the statements made by petitioner both to her friends and to the police including the statements made to the undercover agent to support the argument that the love affair with Arthwell Hayton had reached its logical conclusion when petitioner returned to her husband and gave up the idea of marriage. He emphasized the undercover agent's testimony that Lucille respected her husband and the investigating officer's testimony that petitioner had some feeling for her husband. The defense emphasized that the police had played a game of "dirty pool" in placing the undercover agent in petitioner's jail cell, and concluded:

> "Well, I don't know how many others they have had up there from October the 8th right up until this trial listening and to report on anything she said, but his [*sic*] much we know, no matter how many they have, they haven't got a single thing incriminating against Lucille Miller. They have absolutely no admission no confession of any kind, and they'll never have because Lucille Miller is innocent." [Rep. Tr. p. 2245; A. p. 130.]

The defense also acknowledged that petitioner was aware of the life insurance on her husband's life. [Rep. Tr. pp. 2238-2239; A. pp. 127-128.]

It is abundantly clear beyond any reasonable doubt that the testimony was entirely cumulative and material only as to an issue virtually uncontested by the defense. The evidence was necessarily harmless beyond a reasonable doubt.

B. There Was No Deliberate Elicitation of Statements From Petitioner After a Formal Charging Pleading Had Been Filed.

There was no violation of the rules of the *Massiah* and *Escobedo* cases in the acquisition of petitioner's jail cell statements because the statements were made prior to any formal charging pleading in the State court. There was a total absence of a process of interrogation lending itself to eliciting incriminating statements and petitioner was not denied a requested opportunity to consult with her lawyer. Petitioner had consulted with her attorney and had disregarded his advice when she spoke to Sergeant Paterson. Petitioner is obviously aware of this defect in her contentions because she has attempted to combine the necessary requisites for the applicability of the *Massiah* and *Escobedo* decisions. To get around the requirement of an accusatory pleading having been filed as to the *Massiah* rule petitioner relies on *Escobedo.* To avoid the requirement in *Escobedo* that there be a process of interrogation and a denial of a requested opportunity to consult with a lawyer, petitioner relies upon the indirect and surreptitious interrogation in *Massiah.* Petitioner must claim under *Massiah* or *Escobedo.* She has no federal claim under combination of the two cases because of the January 1965 date of trial. Her claim would be legitimate only if she could show, by appropriate reference to the record, that her statements were the product of a process of interrogation under the broader protection of *Miranda v. Arizona,* 384 U.S. 436 (1966), but *Miranda* is not available to this petitioner in that this case was tried prior to June 13, 1966. *Johnson v. New Jersey,* 384 U.S. 719 (1966). No such showing has been made.

It was held in *Massiah* that the defendant is entitled to a lawyer's help after he has been indicted and that a defendant is denied the basic protections of the specific guarantee of the Sixth Amendment right to counsel, when there is used against him at his trial evidence of his own incriminating words *deliberately elicited* from him by the government *after he has been indicted* and in the absence of his counsel.

In *Escobedo* it was held that where the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out *a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer,* and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied the right to counsel. These cases were adopted and extended in California. *People v. Dorado,* 62 Cal. 2d 338 (1965). In *People v. Arguello,* 63 Cal. 2d 566 (1965), California specifically applied the *Massiah* rule. In that case the defendant was indicted and an attorney appointed to represent him. Thereafter, an undercover narcotic agent for the State of California was incarcerated on a fictitious charge following discussions with the prosecutor, as a pretense to enter the jail cell where the defendant was held. The undercover agent deliberately elicited statements from the defendant. And since one of the statements was tantamount to a confession the California Supreme Court held that the introduction of the statement was reversible error based upon California Constitution, Article 6, section 4½, *Fahy v.*

Connecticut, 375 U.S. 85, 86-87. *Dorado* was decided on January 29, 1965 and *Arguello* was decided in November of 1965, 14 months after Peggy Fisk had been placed in petitioner's jail cell.

In 1963, the California Supreme Court had decided *People v. Lopez,* 60 Cal. 2d 223, 247-248. In that case an undercover agent was purposely placed in a jail cell in order to obtain statements from the defendant. Relying upon *Lopez v. United States,* 373 U.S. 427 (1963), the court held that there was no violation of due process in placing the undercover agent in the jail cell with the defendant or in permitting him to testify as to his conversations with the defendant. The court said:

> "When either physical or psychological coercion is present, the admissibility of a defendant's admission or confession (insofar as the federal Constitution is concerned) is determined by inquiring 'whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.' (Rodgers v. Richmond (1960) 365 U.S. 534, 544 [81 S.Ct. 735, 5 L.Ed.2d 760, 768]; see also People v. Ketchel (1963) 59 Cal.2d 503, 519-522 [7] [30 Cal.Rptr. 538, 381 P.2d 394].) In this case there was no behavior by the State's law enforcement officers that overbore defendant's will to resist nor is there any indication that his admissions were anything but 'freely self-determined.' (Rodgers v. Richmond (1960) supra, at p. 544 of 365 U.S. [5 L.Ed.2d at p. 768].) Moreover, there is shown no mental or physical

coercion; no invasion of privacy; and no inducement by Luna that caused the subject statements to be made by Lopez. In the absence of such factors, a declarant assumes the risk that the person to whom he makes damaging statements may repeat those statements in court to be used against the declarant. (Lopez v. United States (1963) 373 U.S. 427, 438-439 [83 S.Ct. 1381, 10 L.Ed.2d 462, 470, 477].) There was no violation of due process in placing Luna in the Bakersfield jail cell with Lopez or in permitting Luna to testify as to his conversations with Lopez. Except only insofar as concerns consultation with his attorney in a room designated for that purpose, a prisoner has no right of privacy in a jail. (People v. Morgan (1961) 197 Cal.App.2d 90, 93 [3] [16 Cal.Rptr. 838], cert. de. 370 U.S. 965 [82 S.Ct. 1606, 8 L.Ed.2d 830].)"

People v. Lopez, supra, 60 Cal. 2d 223, 248.

In the recent case of *Katz v. United States,* 389 U.S 347, 351 (1967), it was held that what a person knowingly exposes to the public even in his own house or office, is not a subject of Fourth Amendment protection. Mr. Justice White in his concurring opinion said at 363:

"In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employe of the police, *Hoffa v. United States,* 385 U.S. 293 (1966); (2) by a recording device hidden on the person of such an

informant, *Lopez v. United States,* 373 U.S. 427 (1963); *Osborn v. United States,* 385 U.S. 323 (1966); and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with th edefendant in another location, *On Lee v. United States,* 343 U.S. 747 (1952). When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa v. United States, supra.* It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the petitioner 'sought to exclude . . . the uninvited ear,' and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening."

Following the decision in *Escobedo* and *Dorado,* it was held that as long as incriminating statements are not elicited by a process of interrogation, the information obtained by an undercover agent placed in a jail cell to overhear incriminating statements on the part of an accused, is admissible and does not violate the rule of *Escobedo* and *Dorado. People v. Sipult,* 234 Cal. App. 2d 862; *People v. Sogoian,* 232 Cal. App. 2d 430, 434; *People v. Ross,* 236 Cal. App. 2d 364, 370-372.

It was held in *Miranda v. Arizona, supra,* 384 U.S. 436, 478 (1966) that in dealing with statements ob-

tained through an interrogation the court did not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility was not affected by the holding.

It is clear from the above cases that as the law stood at the time Peggy Fisk was placed in petitioner's jail cell the Sheriff had sufficient grounds for a good faith belief that he had a right to place an undercover agent in that jail cell for the purpose of overhearing petitioner's statements provided no attempt was made on the part of the undercover agent to elicit statements from petitioner. The undercover agent was specifically instructed only to listen to petitioner. [Rep. Tr. pp. 1102, 1112; A. pp. 58, 66.] The prosecuting attorney in good faith believed that the statements were admissible for he argued to the trial court at the time he offered the evidence that the witness had not interrogated petitioner but instead had told her to talk to her attorney and that he had been informed by the witness that all she did was listen. [Rep. Tr. pp. 1010-1013; A. pp. 43-45.]

The record does not support petitioner's contention that her statements were deliberately elicited by the undercover agent as a result of a surreptitious process of interrogation. On the contrary, there was no process of interrogation undertaken by the undercover agent and the statements were entirely spontaneous on the part of petitioner.

In the cross-examination of Peggy Fisk, defense counsel developed the fact that she had been instructed by the Sheriff to bring a newspaper article and two fictitious conversations to the attention of petitioner which might be deemed elicitory; however, it was never shown that any statements by petitioner resulted and none were placed in evidence. It is only when incriminating statements are used as evidence against a defendant that there is a constitutional violation. *Massiah v. United States, supra,* 377 U.S. 201, 207 (1964). This particular conduct by the undercover agent was not proper, however, the record does not show any relationship between this improper conduct and the particular statements of petitioner that were introduced into evidence. It was this conduct which the District Court of Appeal condemned but found that it had not injured petitioner. *People v. Miller, supra,* 245 Cal. App. 2d 112, 144. This is true because no product of this improper conduct was introduced into evidence.

The contention of petitioner in the absence of a record showing that her statements were obtained after an accusatory pleading was filed and as the result of a process of interrogation after the denial of requested counsel is clearly subject to the rule that this Honorable Court will not review questions not clearly raised on the record. *Standard-Vacuum Oil Company v. United States,* 339 U.S. 157, 160 (1949). On this record the circumstances of this case preclude any conclusion that the statements of petitioner made in the presence of the undercover agent fall within the exclusionary rules of the *Massiah* and *Escobedo* decisions.

C. The Jail Statements Were Introduced Without Any Objection by the Defense Which Deliberately Allowed the Evidence as Part of Its Strategy.

It is the present law in the State of California that on appeal the issue of denial of counsel during interrogation, after the enunciation of the rules in *Massiah, Escobedo* and *Dorado,* must be based upon an objection taken in the court below. *People v. Hillery,* 62 Cal. 2d 692, 711-712; *People v. Doherty,* 67 A.C. 1, 6-7. The California cases place emphasis on the fact that the decision to waive objection to the introduction of statements of the accused can be attributed to a tactical decision by trial counsel.

In *Doherty* it was held:

> "In the absence of special circumstances justifying an inference of knowing and intelligent waiver of an Escobedo-Dorado claim, we cannot assume such a waiver in a trial held before January 29, 1965."[1]

But stated in that opinion:

> "We recognize that defense counsel in a trial held prior to January 29, 1965, might have deliberately developed on *voir dire* facts which would support the exclusion of the statements under the Escobedo-Dorado rule, yet omitted to object to their introduction in the hope that upon subsequent appeal the showing would serve to reverse. (Compare the facts in People v. Brown (1965) 238 Cal.App.2d 924, 928 [48 Cal.Rptr. 204].) Such a

[1] *People v. Dorado,* 62 Cal. 2d 338, was decided on January 29, 1965. The language in our case which merely required absence of an objection in order to find a waiver was disapproved.

tactical maneuver should not generate a valid basis for reversal. If the People should sustain the burden of establishing the fact of such tactics, we would treat defendant's stratagem as a waiver of the objection."

The decision therefore established that in California in order to find a waiver of the *Escobedo-Dorado* rule benefit an appellate court must find special circumstances justifying an inference of knowing and intelligent waiver of those benefits, such as the tactic of asking questions directed toward the foundation of such an objection but a failure to actually make the objection. The facts of this case certainly justify such a waiver although the trial commenced a few days before January 29, 1965. In circumstances not unlike those in the present case the California Court of Appeal in the very recent case of *In re Woods,* 256 A.C.A. 837, 841-842 found a deliberate waiver of objection on an *Escobedo-Dorado* claim.

As pointed out above, the tactics of counsel in the instant case were obvious. Except for the portion of Peggy Fisk's testimony which was introduced by the prosecution the remainder of her testimony was favorable to the defense, for it brought out that petitioner had stoutly maintained her innocence and told identically the same story to which she later testified. Defense counsel had received a copy of the undercover agent's reports to her superiors concerning her talks with petitioner, and it is reasonable to assume that defense counsel was willing to have the undercover agent testify to show the extremes to which the sheriff went to try to convict her and to show that her story of innocence had never varied. Indeed, as pointed out above, de-

fense counsel in argument utilized the undercover agent's testimony for both these purposes.

The Federal courts will deny a defendant relief if the State Courts refuse to entertain Federal claims on the merits or a defendant for a strategic and tactical reason deliberately bypasses State procedures. *Fay v. Noia*, 372 U.S. 391, 439 (1963).

When the undercover agent was called to the stand as a witness for the prosecution, petitioner's counsel raised an objection that he had not been furnished with the witness's address as promised. At the suggestion of the court, proceedings were then continued in the Judge's chambers outside the hearing of the jury. [Rep. Tr. pp. 1007-1008; A. pp. 41-42.] Once in chambers counsel for petitioner said [Rep. Tr. p. 1009; A. pp. 42-43]:

> ". . . I am going to represent to the Court also that any testimony of this witness concerning any statement made by my client would be in violation of the rule in the Dorado case.[2] She was an undercover agent, and never informed my client of her capacity. Never advised my client of my client's right to remain silent.
>
> "I previously had served on the District Attorney and the Sheriff of this County a demand to be present at any interrogation of my client by any agent of the Sheriff's office. So, any testimony of this witness concerning any statement made by my client not only violates the rule in the Dorado case, but the rule in People v. Sharer as well, and also the rule in Massiah versus United States."

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[2](Footnote ours.) *People v. Dorado*, 62 Cal. 2d 338, had originally been decided on August 31, 1964 but a rehearing had been granted on September 24, 1964.

The district attorney offered counsel for the defense the opportunity to interview the witness, and counsel took advantage of that opportunity. [Rep. Tr. pp. 1009-1010; A. pp. 42-43.] The District Attorney stated [Rep. Tr. pp. 1010-1012; A. pp. 43-45]:

> "Now, so far as the rest of it, the right under the Dorado case and Massiah case and the rest of them, the right of a witness, a defendant to remain silent. It is a defendant's right, not an attorney's. The defendant may waive this right, providing the defendant does so intelligently, knowingly and understandingly. This is the gist of all of those cases.
>
> "Now, this particular witness did not interrogate his client. She specifically told her, the testimony will be that she specifically advised Mrs. Miller not to talk. Her testimony will be that Mrs. Miller told her that her attorneys had advised her that there probably would be somebody in jail trying to pump her, and Miss Fisk, as part of her technique, I suppose, told Mrs. Miller: 'Well you shouldn't talk to anybody except your attorneys and the sheriff,' and, of course, she never did talk to the Sheriff, so that is beside the point.
>
> "She stayed up in the jail with her for about a week and listened and when Mrs. Miller talked to her, on two or three occasions, she told her 'Don't tell me about it.' But Mrs. Miller insisted on telling her. It is Mrs. Miller's right and privilege to talk, if she wants to.
>
> "Nobody pumped her. Nobody interrogated her No attempt was made to force her to talk at all. She did talk, and some statements which she made

which are material to this case, we will desire to have her testify about them, and statements in the report which Mr. Foley saw last December."

The trial court suggested that the prosecution withdraw the witness and gave counsel an opportunity to talk to her, but that on the other objection she would have to be sworn in and at least testify to the preliminary questions and have an objection made at the proper time. [Rep. Tr. pp. 1013-1015, A. pp. 45-47.]

The following morning the undercover agent was the first witness. She was called to the witness stand and asked preliminary questions as to her occupation and the fact of her undercover placement in petitioner's jail cell. The District Attorney asked her if petitioner had talked about herself, the reason she was in jail, about her husband, and about any domestic problems she had had. At that point petitioner's counsel asked to take the witness on *voir dire,* at which time he asked if she had informed the petitioner that she was a law enforcement agent, of her right to remain silent, and of her right to have an attorney present. The witness testified that she told appellant that she should discuss this with her attorney. Counsel for petitioner closed his *voir dire* examination and the direct examination was resumed. *Counsel for petitioner did not interpose any objection whatsoever to the testimony of the undercover agent. Nor did he attempt to lay any foundation that there had been a process of interrogation that lent itself to eliciting incriminating statements.* He was entirely cognizant of the *Massiah, Escobedo,* and *Dorado* decisions for he had raised the point in chambers before the undercover agent was called as a witness. He took the witness on *voir dire* and did not attempt to establish

any facts concerning a process of interrogation on the part of the undercover agent. In fact, he later established with the two heretofore mentioned exceptions, that the undercover agent was specifically instructed only to listen to petitioner and that she had followed those instructions. [Rep. Tr. pp. 1102, 1112; A. pp. 58, 66.] Later, in cross-examination, counsel for the first time developed that the undercover agent had been instructed by the Sheriff to bring a newspaper article and two fictitious conversations to the attention of petitioner which might have provoked comment by her; however. it was never shown that any incriminating statements whatsoever were provoked by these matters. Certainly; any comments of petitioner that might have been provoked by these matters were not introduced into evidence by the prosecution nor were they introduced by the defense.

Under California law counsel for petitioner could have requested that the trial court take evidence outside of the presence of the jury on the issue of whether the statements made by petitioner to the undercover agent were voluntary and were not obtained in violation of petitioner's right to counsel and against self-incrimination. *People v. Schader,* 62 Cal. 2d 716, 727-728. In that case the California Supreme Court held that pursuant to the case of *Jackson v. Denno,* 378 U.S. 368 (1964) and the case of *People v. Gonzales,* 24 Cal. 2d 870. 876-877, this procedure should be followed by the trial court. Counsel for petitioner made no such request for the obvious reason that after having reviewed the report of the undercover agent and after having privately interviewed her, he determined that it was in the best interests of his client that the un-

dercover agent be permitted to testify. This is the only reasonable conclusion that can be drawn from the record. The trial court had not ruled that counsel would not be permitted to introduce evidence on the issue of the foundation for the undercover agent's testimony. There had been no objection, no complaint, and no ruling on the applicability of the *Massiah*, *Escobedo* or *Dorado* decisions. There had merely been a discussion in chambers of the applicable law which was never renewed by counsel. An objection not raised at the trial will not be considered on certiorari to the United States Supreme Court. *Brown v. Allen*, 344 U.S. 443, 480 (1952). A procedural default which is held to bar challenge to a conviction in State courts even on Federal Constitutional grounds prevents implementation of the Federal right. *Henry v. Mississippi*, 379 U.S. 443, 447 (1965).

Counsel for petitioner made no attempt to have the testimony of the undercover agent stricken. The great bulk of her testimony was favorable to the defense, as already pointed out. [Rep. Tr. pp. 1101-1112; A. pp. 57-67.] Having deliberately chosen to waive her constitutional objection to the testimony of the undercover agent and to present the undercover agent's highly favorable testimony to the jury petitioner cannot now complain. In effect, petitioner has attempted to engage in the game of sowing the seeds of reversible error in the record decried by this court in *Kotteakos v. United States*, 328 U.S. 750, 759 (1946). We submit that these seeds are infertile and should not be cultivated by this court.

Petitioner relies on some inapposite language in the opinion of the Fourth District Court of Appeal in the

instant case in arguing that there is no waiver in the State of California when there is a deliberate failure to object to the introduction of statements obtained in violation of the *Massiah* and *Escobedo* decisions. In this opinion the District Court of Appeal said at 144:

> ". . . and if we had the slightest idea that defendant was injured by it we would have no hesitancy in ordering a reversal in spite of the fact of defendant's failure to object to Peggy's testimony."

The reference to the failure to object was not a holding that petitioner was entitled to raise the point on appeal absent an objection because the court went on to hold that petitioner was precluded from raising a point by reason of the failure to object. *People v. Miller, supra,* 245 Cal. App. 2d 112, 144. The above statement was made to emphasize the fact that there was no possible prejudice from the introduction of the undercover agent's testimony. It was necessary for the District Court of Appeal to emphasize harmless error because of the fact that the California Supreme Court had not as yet set down a rule for the necessity of an objection based upon the *Dorado-Escobedo* error. However since the decision in this case the California Supreme Court decided *People v. Doherty, supra,* 67 A.C. 1, 6-7.

The circumstances of this case preclude any conclusion that the statements of petitioner made in the presence of the undercover agent fall within the exclusionary rules of the *Massiah* and *Escobedo* decisions. Furtheremore, the record clearly shows a deliberate, knowing, intelligent and tactical waiver of a claim under those rules.

II.

THE INTRODUCTION INTO EVIDENCE OF PETITIONER'S CUMULATIVE STATEMENTS UNDER THE CIRCUMSTANCES OF THIS CASE WAS HARMLESS IN CONFORMITY TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner contends that this court should not extend the harmless error rule to the introduction of statements secured by unconstitutional police behavior in violation of the *Massiah* and *Escobedo* rules, basing this contention upon previous cases decided by this court and certain policy considerations. The decisions of this Court do not require that a prejudicial error *per se* rule be applied to criminal convictions where evidence of admissions secured in violation of the *Massiah* and *Escobedo* rules may have been received. Indeed they clearly support the application of a harmless error rule to such evidence. The policy considerations urged by petitioner are unsound in view of the overriding value of a properly applied harmless error rule to the administration of justice.

A confession, in criminal law, is a statement by a person accused of crime to the effect that he is guilty of the crime. Unless the statement is broad enough to include every essential element to make out a case against him, it is not a confession of guilt. An admission, in contrast is but an acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction and which only tends toward the ultimate proof of guilt. *In re Cline*, 255 A.C.A. 135, 142 (1967) (and cases cited therein).

In *Chapman v. California*, 386 U.S. 18 (1967) it was urged that all federal constitutional errors regardless of the facts and circumstances must always be deemed harmful. The adoption of such a rule was declined. It was held that the harmless error statutes and rules of the States and the United States to the effect that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the party" applied to constitutional errors; and that there are some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction. It was held that some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error and that a constitutional error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot be conceived of as harmless under the rule that the proper approach to harmless error is "whether there is a reasonable possiblity that the evidence complained of might have contributed to the conviction." *Chapman v. California, supra*, p. 23.

It follows that a constitutional error resulting in the introduction of inadmissible evidence may be deemed harmless if it did not result in the denial of a constitutional right basic to a fair trial and the evidence introduced could not have contributed to the conviction.

A. Petitioner Was Not Denied a Constitutional Right Basic to a Fair Trial by the Unelicited Acquisition of Her Pre-Indictment Admissions in the Absence of Counsel.

The lack of the assistance of counsel at certain stages of the prosecution must almost invariably deny a fair trial, for example, at the trial itself, *Gideon v. Wainwright,* 372 U.S. 335, or at some forms of arraignment, *Hamilton v. Alabama,* 368 U.S. 52, or on appeal, *Douglas v. California,* 372 U.S. 353. However, the secret or in-custody interrogation situations of *Massiah* and *Escobedo* and the identification confrontation situation in *Wade* and *Gilbert* do not invariable deny a fair trial in the absence of counsel. *Johnson v. New Jersey, supra,* 384 U.S. 719; *Stovall v. Denno,* 388 U.S. 293. (1967). Nor does the lack of protection of the Fifth Amendment privilege against self-incrimination in the above situations, absent a coerced confession, invariably prevent a fair trial. *Tehan v. Shott,* 382 U.S. 406 (1965); *Johnson v. New Jersey, supra,* 384 U.S. 719 *Stovall v. Denno, supra,* 388 U.S. 293.

In the cases of coerced confessions and counsel both at the trial and on appeal the principle "applied went to the fairness of the trial—the very integrity of the fact finding process" and averted "the clear danger of convicting the innocent." *Linkletter v. Walker,* 381 U.S. 618, 639 (1965); *Tehan v. Shott,* 382 U.S. at 416; *Johnson v. New Jersey, supra,* 384 U.S. at 727-728.

> ". . . Moreover, coerced confessions are excluded from evidence because of 'a complex of values,' Blackburn v. Alabama, 361 U.S. 199 (1960), including 'the likelihood that the confession is untrue'; 'the preservation of the individual's freedom

of will'; and '"[t]he abhorrence of society to the use of involuntary confessions."' At 207. Cited with approval in Jackson v. Denno, 378 U.S. 368, 385-86 (1964)." *Linkletter v. Walker,* 381 U.S. 618, 638 (1965).

But there is less likelihood of unreliability or coercion present under the situations encompassed by the *Massiah, Escobedo* and similar rulings. *Linkletter v. Walker, supra,* 381 U.S. 618, 638 (1965); *Johnson v. New Jersey, supra,* 384 U.S. 719, 730 (1966).

". . . Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. . . ."

Johnson v. New Jersey, supra, 384 U.S. at 728.

The prime purpose of the *Escobedo* ruling:

". . . is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice . . . to assure that the person who responds to interrogation while in custody does so with intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it. In this respect the rulings secure scrupulous observance of the traditional principle, often quoted but rarely heeded to the full degree, that 'the law will not suffer a prisoner to be made the deluded instrument of his own conviction.' Thus while *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every in-

stance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion."

Johnson v. New Jersey, supra, 384 U.S. at 729-730.

The law on coerced confessions is available to persons as a safeguard. *Johnson v. New Jersey, supra,* 384 U.S. at 730.

". . . [T]he Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. . . ."

Tehan v. Shott, 382 U.S. at p. 416.

Statements obtained in the circumstances of the *Escobedo* and *Massiah* cases may well be voluntary (Stewart J. dissenting in *Escobedo v. Illinois,* 378 U.S. 478, 494) as well as highly reliable and relevant (White J. dissenting in *Massiah v. United States,* 377 U.S. 201, 208 and *Miranda v. Arizona,* 384 U.S. 436, 538).

We therefore reach the conclusion in the instant case that, "All that petitioner attacks is the admissibility of evidence, the reliability and relevancy of which is not questioned," and which had no effect on the outcome. *Linkletter v. Walker, supra,* 381 U.S. at 639.

B. The Introduction Into Evidence of Petitioner's Unelicited Pre-Indictment Admissions Did Not Affect the Outcome of the Trial.

Petitioner by analogy to the coerced confession cases contends that admission of her jail cell statements is so fundamental an error that therefore the harmless error rule cannot save the judgment. She invokes the rule that the admission of an involuntary confession in evidence requires reversal regardless of other evidence of guilt presented to the jury, citing: *Bram v. United States,* 168 U.S. 532 (1897); *Haynes v. Washington,* 373 U.S. 503 (1963); *Rogers v. Richmond,* 365 U.S. 534 (1961); and *Paine v. Arkansas,* 356 U.S. 560 (1958).

In a coerced confession case despite adequate evidence before the jury to sustain the verdict the conviction must be reversed because where "a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession." The judgment must be reversed because the admission in evidence over objection of a coerced confession vitiates the judgment. *Payne v. Arkansas,* 356 U.S. 560, 568 (1958).

> ". . . [R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void State convictions while forced confessions will do so."
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> *Stein v. New York,* 346 U.S. 156, 192 (1952).

It follows therefore that almost invariably a confession will constitute persuasive evidence of guilt and it is therefore usually extremely difficult to determine what part it played in the securing of the conviction. These considerations justify treating involuntary confessions in a class by themselves and refusing to inquire whether in rare cases their admission into evidence had no bearing on the result. *People v. Parham,* 60 Cal. 2d 378, 385-86 (1963). In that case it was stated:

> "Unlike involuntary confessions, other illegally obtained evidence may be, as in this case, only a relatively insignificant part of the total evidence and have no effect on the outcome of the trial. To require automatic reversal because of its admission is to lose sight of the basic purpose of the exclusionary rule to deter unconstitutional methods of law enforcement. (Elkins v. United States, 364 U.S. 206, 217 [80 S.Ct. 1437, 1453, 4 L.Ed. 2d 1688, 1669]; Mapp v. Ohio, 367 U.S. 643, 656 [81 S.Ct. 1684 6 L.Ed.2d 1081, 1090-1091]; People v. Cahan, 44 Cal.2d 434, 443, 445 [282 P.2d 905, 50 A.L.R. 2d 513].) Unless we were to take the unprecedented step of holding that the state must be penalized for violating a defendant's constitutional rights in securing evidence by conferring an immunity upon him (See People v. Valenti, 49 Cal.2d 199, 203 [316 P.2d 633]), we must consider the deterrent effect of the exclusionary rule not as a penalty but as derived from the principle that the state must not profit from its own wrong. (Walder v. United States, 347 U.S. 62, 64-65 [74 S.Ct. 354 98 L.Ed. 503, 506-507]; McDonald v. United States, 335 U.S. 451, 456 [69 S.Ct. 191 93 L.Ed. 153, 158-159]; People v. Mar-

tin, 45 Cal.2d 755, 760 [290 P.2d 855].) The State does not so profit when erroneously admitted evidence does not affect the result of the trial. A reversal for the admission of illegally obtained evidence without regard for prejudice when there is compelling legally obtained evidence of guilt constitutes nothing more than a penalty, not for the officer's illegal conduct in securing the evidence, but solely for the prosecutor's blunder in offering it and the trial court's error in admitting it. To require automatic reversal for such harmless error could not help but generate pressure to find that the unreasonable police conduct was lawful after all and thereby to undermine constitutional standards of police conduct to avoid needless retrial. (See People v. Mickelson, 59 Cal.2d 448, 452 [30 Cal. Rptr. 18, 380 P.2d 658]; People v. Ditson, 57 Cal. 2d 415, 439-440 [20 Cal.Rptr. 165, 369 P.2d 714].) An exclusionary rule so rigidly administered could thereby defeat itself. . . ."

In the case of *People v. Dorado*, 62 Cal. 2d 338, 356 (1965) which was based on the *Escobedo* decision it was held that although under some circumstances the introduction into evidence of statements obtained from a defendant during police interrogation in violation of his right to counsel and his right to remain silent may constitute harmless error, the error is necessarily prejudicial when the statements are confessions. The improper introduction of a confession which has been obtained in violation of the constitutional right to counsel transgresses the protection of due process no less than the illegal introduction of a confession which had been coerced and Courts cannot inquire into the

prejudicial nature of the introduction of an illegally obtained confession for the reasons stated in *People v. Parham* (1963), 60 Cal. 2d 378, 385.

In the case of *People v. Hillery,* 62 Cal. 2d 692, 712, 713, the court found that the trial court committed error in admitting statements of an accused in violation of the rules under *Escobedo v. Illinois, supra,* 378 U.S. 478 (1964) and *People v. Dorado, supra,* 62 Cal. 2d 338, but nevertheless found that the admission of the statements which did not constitute a confession was harmless because it was not only exculpatory but was virtually identical with the defendant's explanation at the trial. A conclusion, readily applicable to our case as argued above.

In *People v. Jacobson,* 63 Cal. 2d 319, 329-331 (1965) the California Supreme Court recognizing the holding in *People v. Parham, supra,* 60 Cal. 2d 378, 385, that almost invariably a confession will constitute persuasive evidence of guilt and it is therefore usually extremely difficult to determine what part it played in securing a conviction and that these considerations justify treating involuntary confessions in a class by themselves and refusing to inquire whether in rare cases their admission in evidence had no bearing on the result, held:

> "Nevertheless, on this record we do have a 'rare case' in which a refusal to inquire into the impact, if any, of the confession on the verdict would result in complete abandonment of article VI, section 4½, of the California Constitution."

The court went on to say:

> "Although the reports are replete with reversals for the use of improperly obtained confessions 're-

gardless of other evidence,' only one case seems to share the distinguishing factual feature here presented: *i.e.*, a case in which the defendant confessed not once but a number of times and in which most of the statements were properly obtained. In Stroble v. California (1952) 343 U.S. 181 [72 S.Ct. 599, 96 L.Ed. 872], the defendant had confessed repeatedly and the confessions were used at trial. He contended on appeal that the first confession in this sequence was coerced. The conviction was affirmed because the high court found the challenged confession voluntary. In dictum, however, the court remarked that had that confession been involuntary a reversal would have followed despite the other confessions. In explaining this view the court noted that 'the confession was a prominent feature of the trial.' (Id. at p. 190.)

"The same cannot be said in the case before us. No undue emphasis was placed on any of the confessions at the guilt phase. Each person who had witnessed defendant make an incriminating statement testified to what he had heard. No one confession contained details significantly different from the others. The two improperly obtained statements were therefore merely cumulative. Moreover, the sequence of the confessions here, where the improper statements were the last obtained, can give rise to no implication that the legally obtained confessions were 'induced' by those subsequently improperly obtained.

"The jury's task was simply to determine whether defendant spoke the truth on the day

> Kelly Babcock died or on the witness stand. There were approximately 10 separate admissions or confessions made by defendant, the number subject to varied calculations, since some began moments after others terminated. It is not plausible, having reviewed this record, to conclude that 10 statements were sufficiently more persuasive than only eight and that the elimination of two would have altered the outcome. *As stated in Fahy v. Connecticut (1963) 375 U.S. 85, 86* [*84 S.Ct. 229*, 11 L.Ed.2d 171], 'the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' Under these circumstances the answer must be unequivocally negative." (emphasis added.)

It therefore appears that as of September of 1965 the law of the State of California was to the effect that the introduction into evidence of admissions or uniquely cumulative confessions in violation of the *Escobedo* and *Dorado* rules was harmless error under the test set forth by the United States Supreme Court in Fahy.[8] It is reasonably inferable that in the instant

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[8]Since that time California has consistently held that error in the introduction of statements in violation of the *Escobedo* and *Dorado* rules which are cumulative of properly admitted statements is harmless error. *People v. Mathis*, 63 Cal. 2d 416, 433-34; *People v. Talley*, 66 A.C. 363, 373 (Reversed as to co-defendant only.). Of particular significance is the fact that the defendant testifies to the same effect as the erroneously introduced statements and it is clear that the improper introduction of the statements did not impel the defendant to take the witness stand. *People v. Nye*, 63 Cal. 2d 166, 175-76 (Reversed for new penalty trial only.); *People v. Mathis*, 63 Cal. 2d 416, 432-34. In the instant case petitioner took the witness stand and restricted her testimony solely to the events on the date of the homicide. She only testified concerning the evidence of her love of Arthwell Hayton on cross-examination by the prosecution.

case the District Court of Appeal had the *Fahy* test in mind at the time that it held that petitioner had not been harmed by the introduction of her jail cell admissions. In any event, the Court was applying the *Dorado* rule and the California standard of *People v. Watson,* 46 Cal. 2d 818, is applicable to that case when applied to cases tried prior to June 13, 1966.[4]

The federal harmless error rule has been found applicable to the introduction of statements in violation of *Massiah* and *Escobedo. United States v. Guerra,* 334 F. 2d 138, 145-147 (1964), and *Puryear v. United States,* 378 F. 2d 29, 30 (1967). In *Guerra* the defendant had been arrested after indictment and taken to the office of the Assistant United States Attorney where he was questioned and during his trial his statements were brought out on the cross-examination of defendant by the prosecutor. The court in upholding the conviction on the basis of harmless error said:

> "But if we thus agree that the prosecutor acted unlawfully in attempting to interrogate Rivera after his indictment and in the absence of counsel, it by no means follows that his conviction was necessarily vitiated. For considered against the background of this case, we do not believe that one innocuous question and answer, introduced in an abortive attempt to impeach Rivera on a minor issue, c.f. Walter v. United States, 347 U.S. 62,

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The condemning web of circumstantial evidence was the compelling factor in petitioner having taken the witness stand not the admission of her love for Arthwell Hayton to the undercover agent in the jail cell.

[4] *People v. Watson,* 46 Cal. 2d 818, 835-837, holds that reversal is required only when it is the "opinion" in the sense of its belief or conviction that "it is reasonably probable that a result more favorable to the appealing party would have been reached."

74 S.Ct. 354, 98 L.Ed. 503 (1954), constitutes an incriminating 'use' of the prior statement so as to require reversal. In short, the fact that Rivera may have been unlawfully questioned does not of itself mean that all subsequent proceedings were tainted with that illegality. Indeed, the Supreme Court's order in the Massiah case specifically provided that the case was to be 'remanded to the United States District Court for the Southern District of New York for further proceedings in conformity with the opinion' of the Court. It seems noteworthy that the Court did *not* direct a dismissal of the indictment. Similarly, in the present case, is [sic] would seem senseless to hold that the government's error, even if contributing in no manner whatsoever to Rivera's conviction, precluded any possibility of bringing him to justice. If, for example, the questioning had not even been mentioned at trial and had not provided the prosecution with any clues or leads, it would have been clear that there was no relationship between the interrogation and the conviction, or the fairness of the trial itself. Under such circumstances, there is no doubt, and Rivera has conceded, that his conviction would have to be affirmed. (Citing case.)

"In this regard, the Supreme Court was careful in Massiah to emphasize that the 'use' to which the prior statement is put must be determinative. Thus, in response to the government's argument that investigation in criminal cases cannot practicably terminate with indictment, the Court conceded that 'in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and

his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial.' As we read this portion of the opinion, it was the *use* of Massiah's *incriminating* statements, and the correlative prejudice to the defendant, which required reversal of the conviction thus obtained; the fact that Massiah had once been unlawfully questioned did not itself mean that he could never be subsequently tried. As we have already demonstrated, in the present case, the statement obtained was *not* incriminating and the innocent use to which it was put at trial was either equivalent to no use at all or actually benefited the defendant; under these circumstances, reversal seems wholly unwarranted.

"In United States v. Kane, 322 F.2d 787 (2d Cir. 1963), we were faced with a factual situation strikingly similar to that presented here. There, in a trial before the Court without a jury, a government agent was permitted to testify as to statements made by the defendant in an interview with an Assistant United States Attorney, nine days after the defendant's appearance before a United States Commissioner for the fixing of bail, and eleven days before his arraignment on the indictment when counsel was appointed. Finding that the statements thus admitted were wholly exculpatory and corroborative of similar evidence already before the Court, we concluded that no prej-

judicial error had been committed, and affirmed the conviction in a brief, *per curiam* opinion.

"Since the possibility of prejudice to the defendant is equally as remote in the present case as it was in Kane, there is no reason why we should reach any different result here. But lest there be any doubt concerning our interpretation of Massiah, a further word seems in order. At least from the time of Powell vs. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), American courts have recognized that a society which denies the assistance of counsel to a defendant at a crucial stage in a criminal proceeding cannot be assured that fair and impartial justice—the indispensable objective of any judicial system—has truly been achieved. Although the road has not been without its detours, the Supreme Court's decisions in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), and now in Massiah have gone far to redress the balance between an often impoverished and generally untutored defendant and the seemingly all-powerful state, with its battery of trained attorneys and its compliment of experienced investigators. But if, at times, society's interest in bringing the guilty to justice has necessarily been subordinated to its concern for protecting the innocent or maintaining the integrity of is [*sic*] police, prosecutorial and judicial machinery, that interest has never been—and in a civilized society can never be—entirely forgotten. The day has certainly not come when courts will set a convicted criminal free for no reason other than that some practice of police or prosecution—wholly un-

related to the conviction itself—did not meet with their approval. If that unhappy day should ever arrive, the often-heard criticism that law and lawyers are interested only in 'technicalities' will have a ring of truth, and courts may rightfully be accused of exalting form above substance.

"We cannot believe that the Courts which decided Powell and Gideon and Massiah, decisions which touched at the core of our adversary system, were concerned only with technicalities of form or legal niceties. The opinions in those cases, rather, reflected an intense belief that the rules which they established were vital if the fundamental rights safe-guarded by our Constitution were to become a living reality. They were designed to ensure that a defendant unequipped or not permitted to engage counsel would not suffer for that reason; they were not intended merely to provide a defendant such as Rivera, whose interrogation without counsel contributed in no way to his conviction, with a technical means to vitiate a fair trial. If we were mechanically to invoke Massiah to reverse this conviction, we would transform a meaningful expression of concern for the rights of the individual into a meaningless mechanism for the obstruction of justice. We cannot, and will not, so act. The judgment of conviction is affirmed."

United States v. Guerra, supra, 334 F. 2d 138, 145-47 (1964).

In the state courts those decisions which have considered the question of the applicability of a harmless error rule to *Escobedo* and *Massiah* errors have applied

the rule except where a compulsion to follow without qualification the coerced confession rule of reversible per se error of the United States Supreme Court was felt. Some cases applying such a harmless-error test are: *State v. Jackson,* 100 Ariz. 91, 412 P. 2d 36 (cert. denied 385 U.S. 877); *Commonwealth v. Guerro,* 349 Mass. 277, 207 N.E. 2d 887; *Walker v. Maxwell,* 1 Ohio St. 2d 136, 205 N.E. 2d 394; *State v. Jones,* 242 Or. 427, 410 P. 2d 219; *Kilpatrick v. State,* 43 Ala. 667, 199 So. 2d 682; *Knowles v. State* (Alabama), 204 So. 2d 506; *State v. Cowans,* 10 Ohio St. 2d 96, 227 N.E. 2d 201; *Hunt v. State* (Maryland), 234 A. 2d 785; *Commonwealth v. Coyle,* 415 Pa. 379, 203 A. 2d 782; *State v. Brown* (Missouri), 404 S.W. 2d 179; *State v. Collis,* 243 Or. 222, 413 P. 2d 53; *State v. Thomas,* 248 S.C. 573, 151 S.E. 2d 855.

Long ago this court in *Kotteakos v. United States* (1946), 328 U.S. 750, this Honorable Court laid down the guidelines of the particular application of the federal harmless error rule in appellate review and in the years that followed the Federal Courts pursuant to those guidelines have found the introduction of admissions to be harmless error. In *Kotteakos* this Court stated that the purpose of section 269 of the Judicial Code was to substitute judgment for automatic application of rules and to preserve review as a check upon arbitrary action and essential unfairness in the trial. As the same time, it was to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed

scheme of errors, especially in relation to procedures, will engender and reflect in a printed record. In enacting this section, Congress intended to put an end to the too rigid application of the rule that error being shown, prejudice is presumed, and to establish a more reasonable rule that if upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. The crucial thing was the impact of the thing done wrong on the minds of other men in the total setting. The test adopted was what effect the error had or reasonably may be taken to have had upon the jury's decision. And if the error did not influence the jury or had but very slight effect the verdict of the judgment should stand except perhaps where the departure was from a constitutional norm as in coerced confession cases. Error in the introduction of evidence of the defendant's admission was held to be harmless under the rule in *Kotteakos*.

In *Neal v. United States*, 342 F. 2d 730, 736-37, and other cases federal courts have found admissions to have been harmless due to the fact that the defendant testified similarly or the evidence was cumulative. *Sadler v. United States* (10th Cir.), 303 F. 2d 664 (1962); *United States v. McGavic*, 337 F. 2d 317; *United States v. Kane, supra*, 322 F. 2d 787; *United States v. Thompson*, 366 F. 2d 167.

Petitioner builds her main argument that the extension of the harmless error rule to *Massiah* and *Escobedo* errors would necessitate overruling precedent upon the "rock" of *Bram v. United States*, 168 U.S. 532

(1897). In that case the defendant made an exculpatory statement after being told that another suspect had incriminated him. The prosecution argued there that the statement was not a confession because the man purported to deny not admit guilt. In answer to this contention the court stated:

> ". . . Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt. . . ."
>
> *Bram v. United States, supra,* 168 U.S. at 541.

Petitioner relies on this language as being the foundation for all subsequent decisions that an admissible confession automatically requires reversal. *Bram v. United States* may well stand for that proposition but only because of its ultimate holding not because of the reasoning in the above-quoted language. This language has not been followed in subsequent decisions and has been specifically discredited in *Stein v. New York, supra,* 346 U.S. 156, 190-91 (1953). In that case in reference to the above quoted language the court said:

> ". . . But the language, while superficially applicable to the question at hand (coerced confession revers-

ible per se error), was addressed to no such problem in the *Bram* case. There the prosecution had introduce into evidence a conversation between an illegally held and uncounseled prisoner and a detective in which the prisoner stated, in reply to an allegation that one 'X' had seen the prisoner commit a crime from his vantage point at a ships wheel, that 'he [X] could not see me from there.' The Government took the position in the *Bram* case that this statement, even if not voluntary, was not a confession, since its author purported to deny, not admit guilt. The quoted language of the Court is the answer to this position. As the Court points out, the evidence was introduced on the theory that it tended to admit guilt, and only on that theory would it have been admissible. It therefore must be treated as a confession. The sentences immediately preceding the quoted language bring this out: 'It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, as this was the only conceivable hypothesis upon which it could have been legally admitted to the jury. It is also clear that in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt.'

"Thus, *Bram* merely decided that a confession otherwise erroneous could not be used merely because the defendant claimed that it did not incriminate him. This is precisely what this Court subsequently held in *White v. Texas,* 310 U.S. 530.

> "In any event, the *Bram* case was a federal case where we exercised supervisory power rather than merely enforced the Fourteenth Amendment. It is not a rock upon which to build constitutional doctrine. According to Wigmore (3rd ed. Vol. 3, pp. 240-241, n. 2), this decision represents 'the height of absurdity in misapplication of the law,' and has been discredited by subsequent cases."
>
> *Stein v. New York,* 346 U.S. 156, at 190-91.

Petitioner has cited the cases of *Haynes v. Washington,* 373 U.S. 503, 518 (1963); *Rogers v. Richmond,* 365 U.S. 534, 541 (1961) and *Payne v. Arkansas,* 356 U.S. 560 (1958) and argues that none of these decisions suggest that a rejection of a harmless error rule turns on any unique evidentiary impact that confessions may have. On the contrary, as we have pointed out above, *Payne* relying on *Stein v. New York, supra,* 346 U.S. 156 (1952) holds that reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence; and that where a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances, this court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission into evidence, over objection of the coerced confession vitiates the judgment. The question of the presence of substantial independent evidence of guilt and the fact that an inadmissible confession played little if any role

in a conviction does not go to the question of harmless error. There is a vast difference between independent evidence of guilt and the finding that the admission of evidence could not have affected the outcome of a trial. As stated by Justice Harlan (dissenting in *Fahy v. Connecticut, supra,* 375 U.S. 85, 95):

> ". . . In any event, the standard applied here required a determination that exclusion of the unconstitutional evidence could not have changed the outcome of the trial. That is a much stricter standard than that of independently sufficient evidence, which leaves open the possibility that the trier of fact did rely on the unconstitutional evidence and, therefore, would have reached a different conclusion if the evidence had been excluded."

Haynes v. Washington at 518 relied solely upon *Rogers v. Richmond* at page 541 in disregarding the presence of substantial independent evidence tending to demonstrate the guilt of the defendant in that case. However, it must be remembered that in *Rogers v. Richmond* at pages 540-42 the trial court had found that the pretense of bringing the petitioner's wife in for questioning "had no tendency to prove a confession that was not in accord with the truth." The court had instructed the jury in the same vein. This Honorable Court held that the trial judge in admitting the confessions as "voluntary," and the Supreme Court errors in confirming the conviction failed to apply the proper standard for determining the admissibility of the confession by going into the question of truth of falsity of the confession. The language which referred to the existence of independent corroborating evidence leaving

little doubt as to the truth of the confession was directed at that point alone not to the question of harmless error.

Petitioner argues that the introduction of evidence of a defendant's out-of-court statement *implicating* himself in the crime charged is a significant step in the prosecution's attempt to obtain a conviction and has a tendency to make the prosecution's entire case seem credible. She argues that the "admission that she continued to love Hayton after her husband's death tended to 'make the prosecution's entire case seem credible.'" Firstly, petitioner's statement that she loved Arthwell Hayton did not implicate herself in crime. It was no more than a statement of the fact that she had a motive to murder her husband to overcome the assumption that a woman loves her husband and would not murder him. Secondly, in the posture of the defense that petitioner had indeed loved Arthwell Hayton and had an adulterous affair with him but no longer intended to marry him the admission was of no consequence. The question was whether, *before* the murder, petitioner had abandoned the idea of *marrying* Arthwell Hayton. The evidence of the prosecution clearly showed that although petitioner was making face-saving statements that she would never marry Hayton she was doing everything in her power to accomplish that end. There is no logical explanation and petitioner did not attempt to explain why the death of her husband would have had any effect upon her feelings for Arthwell Hayton. The crucial point is that she did not admit to the undercover agent that she intended to marry Hayton now that her husband was dead which was the only contested question on motive in issue at the trial.

C. The Purpose to Be Served by the Massiah and Escobedo Rules, the Reliance Upon the Language of These Rules by Law Enforcement Authorities and the Effect of Reversible Per Se Error With Regard to These Rules on the Administration of Justice Are Persuasive Criteria Upon Which to Determine the Applicability of the Harmless Error Rule.

In the last few years this Honorable Court has dealt with the problem of retroactivity in connection with four constitutional rules of criminal procedure. *Linkletter v. Walker, supra,* 381 U.S. 618 (1965); *Tehan v. Shott, supra,* 382 U.S. 406 (1966); *Johnson v. New Jersey, supra,* 384 U.S. 719 (1966); and *Stovall v. Denno, supra,* 388 U.S. 293 (1967). In these cases the principle was established that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application." 381 U.S. at 628; 382 U.S. at 410. As stated in *Johnson v. New Jersey, supra,* 384 U.S. at 727:

> ". . . These cases also delineate criteria by which such an issue may be resolved. We must look to the purpose of our new standards governing police interrogation, the reliance which may have been placed on prior decisions on the subject, and the effect on the administration of justice of a retroactive application of *Escobedo* and *Miranda.* [citation]"

Subsequently this Honorable Court has found that the harmless error rule is applicable to error based upon violations of two of these constitutional rules of criminal procedure *i.e., Chapman v. California,* 386 U.S. 18

(comment and instructions upon a failure to testify) and *Gilbert v. California,* 388 U.S. 263, 274 (confrontations for identification purposes conducted in the absence of counsel).

In *Fahy v. Connecticut, supra,* 375 U.S. 85 (1963) the majority of this Court, in an opinion by Mr. Chief Justice Warren, left the specific question of harmless error open:

> "On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' under the federal standard of what constitutes harmless error." *Fahy v. Connecticut, supra,* 375 U.S. 85 at 86.

However, the Court went on to decide that the evidence was in fact prejudicial. Therefore the error was not harmless and the conviction was reversed. The question of harmless or reversible error was framed as follows:

> ". . . The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial." *Id.* at pp. 86-87.

The majority of the court then proceeded in effect to apply harmless error standards to the facts of the case. The court clearly refused to hold that the mere admission of the evidence in itself required a reversal. Instead, the court stated the rule of appellate review that it would apply and then it proceeded to do what every

state and federal appellate court does when confronted with this same question, that is, review the facts of the case and the evidence produced at trial and determine whether the error is prejudicial or harmless.

We submit that the persuasive considerations that moved this court to apply the above constitutional rules of criminal procedure prospectively to a considerable extent further moved this court to hold a harmless error rule applicable to the denial of the right to counsel in *Gilbert* and the denial of the right against self-incrimination in *Griffin v. California,* 380 U.S. 609 and that these same considerations should persuade this court to hold that a harmless error rule is applicable to the denial of the right to counsel and against self-incrimination as in *Massiah* and *Escobedo.*

If the harmless error rule may be applied in the *Massiah* and *Escobedo* situations, certainly the evidence of petitioner's cumulative statements could not have affected the outcome of the trial.

We again refer to *Johnson v. New Jersey, supra,* at 729-30:

> ". . . Our opinion in Miranda makes it clear that the prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice. See *ante* pp. 458-466. They are designed in part to assure that the person who responds to interrogation while in custody does so with intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it. In this respect the ruling secures scrupulous observance of the

> traditional principle, often quoted but rarely heeded to the full degree, that 'the law will not suffer a prisoner to be made the deluded instrument of his own conviction.' Thus while *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion."

As regards the need for protection of these rights, there is no meaningful distinction between interrogation before and interrogation after formal indictment so that this observation would be equally applicable to *Massiah. Escobedo v. Illinois, supra,* 378 U.S. 478, 486 (1964). Evidence obtained in violation of the *Massiah* and *Escobedo* rules may be "relevant, reliable and highly probative of the issue which the trial court has before it—whether the accused committed the act with which he is charged." (Justice White dissenting in *Massiah v. United States, supra,* 377 U.S. at 208.) This is readily ascertainable because:

> "[O]ur case law on coerced confession is available for persons whose trials have already been completed."
>
> *Johnson v. New Jersey, supra,* 384 U.S. at 730.

The conclusion must be drawn therefore that the "complex of values" and "integrity of the fact finding process" is not invariably impaired by the violation of *Escobedo* and *Massiah* rules and may therefore be harmless error.

Moreover any misconduct of the police in violating the *Massiah* and *Escobedo* rules has already occurred

and will not be corrected by releasing the prisoners involved. California has recognized the impropriety of surreptitious interrogations after indictment. *People v. Arguello,* 63 Cal. 2d 566 (1965) and in-custody interrogation *People v. Dorado,* 62 Cal. 2d 338 (1965) and has given clear direction to state courts for the future. "Certainly this is the appropriate remedy for the constitutional error committed". (Harlan J. Dissenting in *Chapman v. California,* 386 U.S. 18, 49.) If there was no harm in the error there is nothing to be gained by reversing the case merely to punish the police. We cannot believe that any police officer or prosecutor would rely on the "harmless error" rule and anticipate that every magistrate and judge involved will rule erroneously and receive the evidence and that ultimately the judgment will be affirmed by appellate justices on the ground of harmless error. We agree with Mr. Justice Harlan, that

> ". . . there is no danger that application of the [harmless error] rule will undermine the prophylatic function of the rule of inadmissibility." *Fahy v. Connecticut,* 375 U.S. at 944 (dissenting opinion).

As pointed out above in this brief, law enforcement officials involved in this case clearly relied upon previous United States Supreme Court and California Supreme Court decisions in the procedures they followed in placing the undercover agent in petitioner's jail cell. The prosecutor was under the impression that the undercover agent had been instructed only to listen. [Rep. Tr. p. 1013; A. p. 45.] It was only developed on cross-examination by counsel for petitioner after having privately interviewed the undercover agent that im-

proper matters had been brought to petitioner's attention in order to provoke comment. However, as we pointed out, no evidence of any provoked comment was introduced in the case. When law enforcement agencies fairly rely on the language of the cases and the trial courts fairly rely upon the language of these decisions and erroneously admit evidence these officials should not be penalized by mandatory reversal where it can be demonstrated beyond a reasonable doubt that the accused has suffered no prejudice as a result of the error.

In *Johnson v. New Jersey, supra,* 384 U.S. 719, 731 it was said:

> "Nor would retroactive application have the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed. We have pointed out above that past decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confessions. (Citing cases.) Prior to *Escobedo* and *Miranda,* however, we had expressly declined to condemn an entire process of in-custody interrogation solely because of such conduct by the police. (Citing cases.) Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda.* This is in favorable comparison to the situation before Mapp v. Ohio, 367 U.S. 643 (1961), where the States at least knew that they were constitutionally forbidden from engaging in unreasonable searches and seizures under Wolf v. Colorado, 338 U.S. 25 (1949).

> "At the same time, retroactive application of *Escobedo* and *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards. Prior to *Escobedo* and *Miranda,* few States were under any enforced compulsion on account of local law to grant requests for the assistance of counsel or to advise accused persons of their privilege against self-incrimination."

Just as retroactive application of *Escobedo* and *Massiah* would seriously disrupt the administration of criminal laws requiring the retrial and release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards, to a lesser extent but of significant degree, the administration of justice is disrupted by the necessity to retry any criminal case. The necessary time involved in perfecting an appeal may well result in the loss of evidence, in the absence of witnesses, as well as the fact that the memory of man is frail and transitive. If an accused has suffered no harm by the introduction of evidence there can be no justification for the expense and agony of retrial to both the people and the accused and the possibility that due to unavoidable circumstances the guilty may not be convicted.

We think these arguments are sound in their support of prospective application of these constitutional criminal rules of procedure and equally sound in support of the application of harmless error rules to constitutional error as a result of their infraction.

D. The Proposition That Constitutional Errors Can Be Harmless Is Supported by Ample Precedent.

In applying a rule of appellate review which requires a showing of prejudice for reversal and appraising the effect of inadmissible comment in instructions upon the entire course of the proceedings of the trial, this Honorable Court in *Chapman v. California,* was carrying out sound principles announced and applied in prior decisions of this court.

In *Motes v. United States,* 178 U.S. 458 (1900) this Court unanimously applied a harmless error rule to a federal criminal judgment in which evidence had been received in violation of the defendant's rights under the Sixth Amendment to the United States Constitution. Several defendants were tried for conspiracy to violate federal civil rights. Taylor, one of the defendants, confessed and testified to the killing at the preliminary hearing. Federal officials negligently allowed him to escape before trial. At the trial, his testimony was read into the record. Motes testified that he and Taylor had done the killing. All defendants were convicted and appealed. Judgment was reversed as to the other defendant and affirmed as to Motes.

This Court held that the use of Taylor's statements violated the Sixth Amendment rights of all defendants, but did not prejudice Motes because of his judicial confession, which was regarded as conclusive evidence of guilt.

> "... We can therefore say, upon the record before us, that the evidence furnished by Taylor's statement was not so materially to the prejudice of Columbus W. Motes as to justify a reversal of

> the judgment to him. It would be trifling with the administration of the criminal law to award him a new trial because of a particular error committed by the trial court, when in effect he has stated under oath he was guilty of the charge preferred against him." *Id.* at 476.

A similar rule was applied by this Court in reviewing a state conviction in which there was a violation of the defendant's right to be present during the proceedings, a right at that time deemed analogous to the rights conferred by the Sixth Amendment. Even though the defendant was not permitted to be present at a viewing of the scene of the offense by the jury, although his attorney was present, this Court affirmed a murder conviction with a death sentence on the ground that no prejudice was shown. *Snyder v. Massachusetts,* 291 U.S. 97 (1934).

Similarly, violations of the defendant's privilege under the Fifth Amendment, as implemented by federal statute, have been held not to constitute reversible error *per se,* but to be subject to the waiver doctrine (*Johnson v. United States,* 318 U.S. 189 [1943]) and to be subject to a form of the harmless error rule. *Wilson v. United States,* 149 U.S. 60 (1893). See also *Haines v. United States,* 188 F. 2d 546; *United States v. Donnelly,* 179 F. 2d 227; *Cloud v. United States,* 361 F. 2d 627 (8th Cir. 1966); *United States v. Knox Coal Company,* 347 F. 2d 33 (5th Cir. 1965); *Coleman v. Denno,* 223 F. Supp. 938 (Sdny 1963), affirmed sub nom; *United States v. Denno,* 330 F. 2d 441 (2d Cir. 1964).

As already noted above, this Honorable Court has recognized that in the situation of a confrontation for

identification in the absence of counsel there is a deprivation of the right to counsel and a danger of deprivation of the right against self-incrimination. The error well may be harmless. *Gilbert v. California, supra,* 388 U.S. 263, 274 (1967). We firmly believe, in view of the opinion in *Fahy v. Connecticut, supra,* 375 U.S. 85 (1963), the concurring opinion of Justice Stewart in *Chapman v. California, supra,* 386 U.S. 18, 44 and the dissenting opinion of Harlan J. in *Chapman v. California, supra,* at 50 that the application of the harmless error rule to the introduction of illegally seized evidence is clearly foreshadowed.

In summary, this precedent is highly persuasive and we feel dispositive of the question of the applicability of the harmless error rule to *Massiah* and *Escobedo* violations unless there are strong policy reasons to the contrary. Petitioner has set forth weak policy considerations that are entitled to very little weight.

E. There Will Be No Inordinate Difficulty in the Application of a Harmless Error Rule to Admissions.

Petitioner contends that the application of a harmless error rule to *Massiah* and *Escobedo* violations will place an undue burden on this and other appellate courts in reviewing cases involving those errors. It is argued that it is inconsistent to refuse to draw a distinction between confessions and admissions for the purpose of determining a violation of *Massiah* and *Escobedo* and yet draw such a distinction for the purpose of determining whether the admission of such evidence was prejudicial. The distinction between admissions and confessions is generally workable as the experience in Cali-

fornia has proved. *People v. Powell*, 67 A.C. 25, 47. In the event that a statement of an accused cannot be so categorized, the usual result will be that the statement is tantamount to a confession in its impact on the trier of fact and therefore prejudicial. The burden upon an appellate court is not great because under the rule of *Chapman v. California* the appellate court must be convinced beyond a reasonable doubt that the introduction of an admission could not have affected the verdict. The burden rests upon the prosecution to prove this fact beyond a reasonable doubt. Unless the prosecution shoulders the load and meets this burden the appellate court has no other alternative but to reverse. When the prosecution has set forth sufficient facts and arguments to demonstrate beyond a reasonable doubt that the evidence introduced could have had no effect upon the outcome of the trial the lack of prejudice is self-evident. For the most part the United States Supreme Court may rely upon the State courts in the application of the harmless-error rule as will be argued below.

It is entirely consistent to distinguish between admissions and confessions for the purpose of determining harmless error yet deny that distinction for the purpose of determining that there was error. There is no justifiable reason for a constitutional right to depend on the extent to which a statement has incriminating tendencies whereas the question of prejudice is a factual one and the distinction between an admission and a confession is not so much a category as it is a label placed upon a statement that has lesser to no incriminating tendencies. It is the type of decision which judges are called upon to make in the exercise of their judicial

functions. It is not novel; it is traditional. Whatever burden may be involved this court readily assumed in *Chapman.*

F. There Was No Prosecutorial Misconduct.

Petitioner relies upon *Berger v. United States,* 295 U.S. 78, a case involving deliberate and gross misconduct by a prosecuting attorney to argue that a harmless-error rule should not be applied to the facts of this case. Petitioner charges the district attorney with intentional misconduct in deliberately introducing evidence he knew to be unconstitutionally obtained. The record does not justify such a conclusion. The instructions given to the undercover agent and the statements of the district attorney to the court at the time the evidence was offered clearly indicate that there was an attempt to comply with previous decisions of this Court and the California Supreme Court, as we have argued above. The improper conduct of the undercover agent which took place after she had been placed in the jail cell at the instigation of the sheriff has not been shown on this record to have been within the knowledge of the district attorney. His statements to the court support such a conclusion. [Rep. Tr. pp. 1010-1013; A. pp. 43-45.] The facts with regard to this conduct were brought out on cross-examination by the defense after it was given the opportunity to privately interview the undercover agent who had been unavailable until that time. [Rep. Tr. pp. 1009-10, 1105, 1108; A. pp. 42-43, 60, 63.] The California District Court of Appeal did

not find that the prosecution was guilty of misconduct. When we speak of misconduct it must be noted that defense counsel examined the undercover agent on *voir dire* and deliberately withheld examination into this subject matter until cross-examination after the testimony of the witness on direct examination had already been admitted and it would be too late for the trial court to have prevented the introduction of unconstitutionally obtained evidence. There was no objection on the part of the defense that the district attorney was guilty of deliberate misconduct in producing this evidence even though the facts were known to the defense long before the witness took the stand. It is obvious that the defense was interested in seeding the case with constitutional error that could not be corrected and that strategy has now reached its final culmination before this Court. We do not feel that the strategy should be rewarded under the circumstances of this case when no harm to petitioner has been shown.

Petitioner has categorized the error in this case as "two-stage" arguing that constitutional error took place both in the jail cell and in the court room. This court has never had occasion to decide whether a separate denial of a constitutional right occurred when unconstitutionally obtained evidence was used in a trial. The Fourteenth Amendment provides, in part, that: "No state shall . . . deprive any person of life, liberty or property without due process of law." This language implies that there can be no denial of due process until a person has actually been deprived of life, liberty or

property. It follows that the mere use during a trial of unconstitutionally obtained evidence does not, in itself, violate due process, since the person against whom such evidence has been used may nonetheless be acquitted, and one who has been acquitted cannot be said to be denied due process. The logical conclusion is that a denial of due process has occurred only when a conviction has been obtained through the use of unconstitutionally obtained evidence.

The basic premise of the harmless error rule, as applied in the *Massiah* and *Escobedo* type circumstances, is that the evidence played no part in determining the conviction. This being true, how can it be said that the introduction at trial of unconstitutionally obtained evidence which in fact is harmless constitutes a separate denial of constitutional rights? Therefore, if one of the purposes of the exclusionary rule in *Massiah* and *Escobedo* is to rectify the denial of a constitutional right, the right in question is the right to avoid being convicted through the use of unconstitutionally obtained evidence. If the harmless error rule is applied in order to hold that such evidence played no part in securing a conviction, then the harmless error rule does not prevent the fulfillment of this purpose of the exclusionary rule. As this Court has observed, with regard to illegally seized evidence, the exclusionary rule can never rectify the primary violation of the Fourth Amendment—the unreasonable search and seizure itself;

> "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Linkletter v. Walker, supra,* 381 U.S. 618, 637 (1965).

G. The Application of the Harmless Error Rule to the Evidence of Petitioner's Jail Cell Statements Will Serve the Useful Purpose of That Rule and Will Not Impair the Deterrent Effect of the Exclusionary Rules of Massiah and Escobedo.

Petitioner argues that the application of the harmless error rule to the intentional introduction of unconstitutionally obtained evidence would prompt prosecuting attorneys to disobey the law and gamble with the precious product of their labors, *i.e.*, the conviction of criminals, and that the salutory purpose of the harmless-error rule would not be served in such cases. In effect petitioner is arguing that the application of a harmless-error rule to any error should depend upon whether the error was unintentional and in good faith. The record in this case is clear that the prosecutor in good faith attempted to follow the law of the United States Supreme Court and the California Supreme Court, however, we do not feel that the harmless-error rules of all of the States and the United States were ever intended to be a prize only to be utilized upon a showing of good faith. This has not been the practice of the courts and is not a relevant consideration as stated in *Chapman v. California*, 386 U.S. 18 at 22:

> ". . . All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."

And at page 23:

> "'. . . The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. . . .'"

We do not have in this case a persistent course of deliberate misconduct on the part of the prosecuting attorney. This is demonstrated by the very brief and what later proved to be innocuous questions asked of the undercover agent. Petitioner has failed to show any connection between the improper conduct of the undercover agent and the statements which the prosecuting attorney introduced at the trial.

We do not dispute the proposition that misconduct and lawless law enforcement must be deterred. The point is that failure to apply the harmless-error rule will not deter the violations of constitutional rights because it does not bear directly or indirectly upon the protection of the United States Constitution. The constitutional standards governing the interrogation of persons accused of crimes are expressed in many opinions of this court and of the state and federal appellate courts and California has sought as best it could to comply with those standards and apply them to state procedures. Whether or not the harmless error rule survives in *Massiah, Escobedo* and similar cases will not in any way expand or increase the protection of the Constitution. It is conceivable, as Chief Justice Traynor pointed out in *People v. Parham, supra,* that a rule requiring reversal without regard to the effect of the error might, consciously or subconsciously, induce appellate judges to limit the scope of the Constitution to prevent unnecessary and unwarranted reversals. It is inconceivable, however that withholding of the harmless error rule could in any way expand the protection of the *Massiah* and *Escobedo* rules.

Take the case at bar as an example. The District Court of Appeal held that the jail cell statements of

petitioner were unconstitutionally obtained under *Dorado*. This ruling is binding upon law enforcement officers, prosecutors, trial courts and magistrates. In declaring the conduct of the undercover agent indefensible, the State Appellate Court was performing its historic office of interpreting and applying the Constitution and both declaring the rights of the citizenry and the duty of law enforcement officers and lower courts. The publication of the opinion gives guidance to officers and lower court judges and prosecutors so that they can conform with constitutional requirements in the future. The State Appellate Court had another historic office to perform. And that was to dispose of the case at hand. In determining whether the conviction would be affirmed or reversed the State appellate court had to abide by the California Constitution, as the Justices have sworn to do, and appraise the effect of the erroneously admitted evidence in light of the outcome of the trial. It did so, and determined that a reversal was not warranted. But, in arriving at this conclusion the court was not concerned with the Fifth and Sixth Amendments, with the duty of officers and prosecutors under those amendments or with the rights of citizens under those amendments. It was concerned only with the effect of the evidence, regardless of the reason for its inadmissibility. The difference in these functions should be clearly recognized.

It is clear then that the harmless-error rule, or to put it more accurately, the rule governing the disposition of cases on appellate review, is a rule of judicial administration which regulates the relations between appellate courts and trial courts. It is not a rule that measures the nature and extent of constitutional

rights. It neither enhances nor limits constitutional rights. Nevertheless, petitioner argues that the harmless-error rule does have an effect on the enforcement of the rules governing the interrogation of those accused of crime in that the rule will tempt "some prosecutors to take unsavory gambles by introducing unconstitutionally obtained statements which they regard as potentially helpful to their case, but which they believe an appellate court may, on a cold record, regard as harmless." Presumably, petitioner would also argue that the police may be tempted to obtain unconstitutionally induced statements to offer to the prosecution for this unsavory purpose. It would not stretch petitioner's argument to add that trial court judges will resolve differences of opinion against constitutional rights again relying on that self-same saving grace.

This argument conjures up a spectacle which, if true, might give pause to the court. The trouble is that the argument is based on both an unrealistic and naive view of the impact of the exclusionary rules upon police activity and the function of the district attorney's office. Deterrence is mainly achieved by informing and training law enforcement officers so that they can comply with the requirements of the constitutional rules of criminal procedure. The education and training of law enforcement officers does not spring full blown from the minutes of the state appellate courts or of this Court. A costly and demanding program is required, and it is probably fair to say that we have only started on an adequate program of this kind. Nevertheless, such programs are the only answers to insuring the protections of the constitutional rights of the individual and insuring that admissible evidence is se-

cured so that guilty persons may be apprehended and removed from society.

We do not, of course, dispute the conclusions that the exclusionary rules in *Massiah* and *Escobedo* and similar rules are necessary in order to put teeth into the constitutional guarantees sought to be protected by these rules. But the exclusionary rule in California is given effect in a variety of ways. Probably the most important effect, from the standpoint of the citizens, arises from the restraint shown by police officers when they feel, as a result of the educational and training programs earlier mentioned, that they cannot lawfully interrogate a suspect under the circumstances and in light of the controlling principles of law. If the officer secures statements under questionable circumstances the question of the compliance with the *Massiah, Escobedo* and similar rules will be reviewed by the district attorney in determining whether to issue a felony complaint or take the case to the grand jury, and there is no question that the product of many interrogations are excluded at that time. Thus, the impact of the exclusionary rule is frequently felt before the case ever reaches the court. Probably the impact is most significant upon a police officer when his own superior refuses to take the case to the district attorney because he has doubts about the statements obtained or when the district attorney rejects the case on the ground that the statements would be inadmissible at the trial.

If the district attorney feels that he can proceed with the case, the defendant may object to the evidence at the preliminary examination and the magistrate will exclude the evidence if he is satisfied that there was a violation of the *Massiah, Escobedo* or similar cases,

and the case goes no further. If the magistrate receives the evidence and the defendant is bound over to the Superior Court, he may move to set aside the information under section 995 of the Penal Code and in most cases raise the question of the introduction of statements obtained by the police. If that motion is denied he may apply to the Court of Appeal under section 999(a) of the Penal Code for a writ of prohibition raising the question of the above case rules. If the Court of Appeal denies this petition he may petition the California Supreme Court for a hearing. If he is unsuccessful in his pretrial motions and in seeking appellate review, he may raise the question again during the trial by a timely objection to the evidence. If that objection is overruled and he is convicted, he may again raise the question on motion for a new trial in the Superior Court. If that motion is denied he may appeal from the judgment of conviction or order granting probation and raise the question in the appellate court.

We cannot believe that any police officer or prosecutor would rely on the "harmless error rule" and anticipate that every magistrate and judge involved would rule erroneously and receive the evidence and that ultimately the judgment would be affirmed by the appellate justices on the ground of harmless error.

In any event, the prosecutor does not decide questions of admissibility; he can only offer evidence. Our experience does not indicate that the trial judges in California are the submissive dupes that petitioner seems to imagine them to be. If anything, the complaints we receive from the district attorneys would tend to indi-

cate a reluctance to receive evidence which is questionable in any degree on the theory, which is a sound one from the trial judge's standpoint, that he cannot err in excluding prosecution evidence. He will never be reversed for sustaining an objection to the People's evidence.

We repeat our agreement with Mr. Justice Harlan, that ". . . there is no danger that application of the [harmless error] rule will undermine the prophylactic function of the rule of inadmissibility." *Fahy v. Connecticut*, 375 U.S. at 94 (dissenting opinion).

To accept petitioner's misconduct argument would be tantamount to holding that whenever the question of the admissibility of evidence under the *Massiah, Escobedo* and similar rules is decided erroneously in favor of the prosecution, the prosecuting attorney may be charged as deliberately introducing unconstitutional evidence. The various factual situations that prosecutors and courts will encounter in the infinite future as has been demonstrated by the search and seizure cases throughout the years will inevitably result in some erroneous rulings. Men will always differ as to the evaluation of factual situations. If convictions result from such erroneous rulings, the harmless error rule will serve the salutory purpose of saving those convictions where it can be shown beyond a reasonable doubt that the erroneous rulings could not have affected the outcome. In the final analysis justice is served by the affirmance of a conviction unaffected by constitutional error.

CONCLUSION.

This judgment should be affirmed because there is no showing upon this record that the introduction of petitioner's jail cell statements deprived her of the constitutional right to counsel and against self-incrimination in that the statements were made prior to the instigation of judicial proceedings and were not elicited by law enforcement authorities either indirectly or through a process of interrogation after petitioner had requested the presence of her attorney. In fact, petitioner (having consulted with her attorney and in disobedience of his instructions), had already agreed to speak to the investigating officer, thereby waiving any argument that she desired the presence of counsel when she talked to authorities. Furthermore, the statements were introduced into evidence while not at the instigation of the defense certainly with its deliberate acquiesence for patent purposes of defense strategy.

Furthermore, the judgment should be affirmed because the introduction of the jail cell statements of petitioner were entirely consistent with her defense namely that she was in love with Arthwell Hayton but had given up any idea of marrying him. Contrary to the assertion of petitioner at page 31, in her brief the defense did not attempt to show that her infatuation with Arthwell Hayton had ended before her husband's death. She admitted that right up to the time of her husband's death she was still in love with Arthwell Hayton. The defense attempted to show instead that petitioner had given up any hope of *marrying* Arthwell Hayton, however, it was clearly demonstrated, as argued by the district attorney, that she still *loved* Arthwell Hayton and was only saying that she no longer

intended to *marry* him whereas her conduct clearly indicated that she fully intended to marry Arthwell Hayton after her husband's death. The testimony of the undercover agent added nothing to the evidence of the prosecution that had not already been introduced through petitioner's statements to the police and to her friends and associates. Furthermore, petitioner's testimony established beyond any question that she was in love with Arthwell Hayton right up to the time of her husband's death which was the only period of time relevant to motive. Considering the over-all length of the district attorney's argument the testimony of the undercover agent was not relied upon but completely underplayed. The jail cell statements were not even mentioned in the opening statement of the prosecution and the only use of the statement in final arguments was to show a slight inconsistency between appellant's testimony that the love had ended at the moment of petitioner's husband's death and her statements to the undercover agent. The likelihood that love ended so abruptly could not have seriously been considered by the jury. The district attorney's opening statement is set forth at pages 1-28 of the Reporter's Transcript and his argument concerning matters relative to petitioner's motive is set forth in the Reporter's Transcript at pages 2018-21, 2023-28, 2029-30, 2033, 2038-40, 2058-67, 2265-66, 2271-72, 2274-75, A. pp. 103-122, 130-134.

We have demonstrated beyond any reasonable doubt that there was no reasonable possibility that this evidence could have contributed to the conviction. *Chapman v. California, supra,* at pp. 23-24. As we have pointed out in our brief, at the time that the District Court of Appeal decided that the evidence of petitioner's jail

cell statements had not harmed her California was following the standards set forth in *Fahy v. Connecticut, supra,* at pp. 86-87. The language of the District Court of Appeal clearly evidences the fact that that court passed beyond the question of reasonable doubt and reached the certain conclusion that the introduction of the jail cell statements had not harmed petitioner and had therefore not had any effect whatsoever upon the outcome of the case. The court stated:

> ". . . and if we had the slightest idea that defendant was injured by it we would have no hesitancy in ordering a reversal . . ." *People v. Miller, supra,* 245 Cal. App. 2d 112, 144.

The Court clearly indicated that it was ready to reverse the case in the event of any possibility of harm but found none. In view of the fact that the error in this case was based upon the *Dorado* rule, the California standard for harmless error found in *People v. Watson, supra,* 46 Cal. 2d 818, 835-37, is applicable in any event. Thus a remand for reconsideration is not required. We respectfully request that this Honorable Court, after examination of the record and consideration of the above points and authorities, affirm the conviction, if need be, by the application of the doctrine of *Chapman v. California* to the instant case.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

PHILIP C. GRIFFIN,
Deputy Attorney General,

Attorneys for Respondent.

APPENDIX.

UNITED STATES CONSTITUTION

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

Title 28

28 U.S.C. §1257 (1964), 62 Stat. 929 (1949)

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. §2111 (1964), 63 Stat. 105 (1949)

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

CALIFORNIA CONSTITUTION

Article I, §13.

§13. Criminal cases; speedy and public trial; process for witnesses; appearance and defense; counsel; double jeopardy; self-incrimination; due process; failure to explain or deny; depositions.

In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. (Amended Nov. 6, 1934.)

Article VI, §4½

Sec. 4½. No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. (Add Oct. 10, 1911; amended Nov. 3, 1914.)

CALIFORNIA PENAL CODE

§686. Defendant's rights; speedy and public trial; counsel; production of witnesses; confronting adverse witnesses; Exception.

In a criminal action the defendant is entitled:

1. To a speedy and public trial.

2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel.

3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine

the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or can not with due diligence be found within the state; and except also that in the case of offenses hereafter committed the testimony on behalf of the people or the defendant of a witness deceased, insane, out of jurisdiction, or who can not, with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted. (Enacted 1872. As amended Stats. 1911, c. 187, p. 364, §1.)

CALIFORNIA PENAL CODE

§995. Cases in which indictment or information must be set aside.

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.

2. That the defendant has been indicated without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.

2. That the defendant had been committed without reasonable or probable cause.

[Enacted 1872. As amended Code Am. 1880, c. 118, p. 43, §1; Stats. 1911, c. 256, p. 435, §1; Stats. 1927, c. 854, p. 1756, §1; Stats. 1939, c. 457, p. 1806, §1; Stats. 1949, c. 1311, p. 2298, §1.]

§999a. Writ of prohibition; time for filing petition; grounds; service; time for issuance of alternative writ.

A petition for a writ of prohibition, predicated upon the ground that the indictment was found without reaable or probable cause or that the defendant had been committed on an information without reasonable or probable cause, must be filed in the appellate court within 15 days after a motion made under Section 995 of this code to set aside an indictment on the ground that the defendant has been indicted without reasonable or probable cause or that the defendant had been committed on an information without reasonable or probable cause, has been denied by the trial court. A copy of such petition shall be served upon the district attorney of the county in which the indictment is retained or the information is filed. The alternative writ shall not issue until five days after the service of notice upon the district attorney and until he has had an opportunity to appear before the appellate court and to indicate to the court the particulars in which the evidence is sufficient to sustain the indictment or commitment. [Added, Stats. 1949, c. 1311, p. 229q, §2, as amended Stats. 1953, c. 614, p. 1861, §1.]

CITY OF SAN BERNARDINO, STATE OF CALIFORNIA

No. F 8754

THE PEOPLE OF THE STATE OF CALIFORNIA VS.

LUCILLE MARIE MILLER

DEPUTY DISTRICT ATTORNEY FOR PEOPLE

ATTORNEY FOR DEFENDANT

REPORTER

$

BAIL (CASH OR BOND) POSTED, DATE BY

DISPOSITION OF BAIL DATE

MUNICIPAL COURT SAN BERNARDINO COUNTY CALIFORNIA SAN BERNARDINO JUDICIAL DISTRICT

DATE	
10-13-64	COMPLAINT FILED, Sworn to by WILLIAM PATERSON, Charging defendant with having on October 8, 1964, 19 , at and in the County of San Bernardino, State of California committed a FELONY, to-wit: Murder (PC 187) Warrant of arrest issued and given to No. Bail Warrant issued to SO for service. Bail fixed at $ No. Bail
10-13-64	11:00 A.M. DDA Turner for People, Atty Edward Foley of Holcomb Kassel & Ward with Deft. Atty states deft will not waive the informing of right. ~~Rmk~~ Deft arr and prel hear set for 10-23-64 at 9:15 AM. The deft's motion to admit deft to bail is denied. Atty Foley for the deft served Notice to the Dist Attorney and Asst DA Turner in open Court. Atty Foley serves notice to the Sheriff on Sheriff Bland in Open Court and gives copies to Court. JBL
10-21-64	Dismissal filed. Deft. indicted by Grand Jury on 10/20/64 for same offense.

I, RUDOLPH L. CORONA, Clerk and Administrative Officer of the Municipal Court, San Bernardino Judicial District, County of San Bernardino, State of California, hereby certify the foregoing instrument to be a full, true and correct copy of the original now on file in my office.

Dated October 16 1967

RUDOLPH L. CORONA, Clerk

By [illegible] Deputy

ORIGINAL

IN THE MUNICIPAL COURT OF SAN BERNARDINO JUDICIAL DISTRICT
COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. LUCILLE MARIE MILLER, Defendant.

Complaint No. [illegible]

Bail $ No Bail
Want to 46

STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO, ss.

On the 13th day of October, 19 64, in the County of San Bernardino, State of California, personally appeared before me William Paterson who, being duly sworn, under oath complains and accuses LUCILLE MARIE MILLER

of the crime of MURDER (P.C. 187)

a felony committed as follows:

That said LUCILLE MARIE MILLER

on or about the 8th day of October, 19 64, ~~in San Bernardino Judicial District~~, in the County of San Bernardino, State of California, did unlawfully murder Gordon Eugene Miller, a human being.

FILED
OCT 13 1964
SUPERIOR AND MUNICIPAL COURTS
SAN BERNARDINO COUNTY, CALIFORNIA

MUNICIPAL COURT
SAN BERNARDINO COUNTY
EUREKA
SAN BERNARDINO JUDICIAL DISTRICT

I, RUDOLPH L. CORONA, Clerk and Administrative Officer of the Municipal Court, San Bernardino Judicial District, County of San Bernardino, State of California, hereby certify the foregoing instrument to be a full, true and correct copy of the original now on file in my office.

Dated October 18 1967

RUDOLPH L. CORONA, Clerk

By [signature] Deputy

Said complainant therefore prays that warrant may be issued for the arrest of said defendant... and that ....he.... may be dealt with according to law.

William Paterson

Subscribed and sworn to before me this 13th day of October, 19 64

DAT:eb

J. B. LAWRENCE
Judge of the Municipal Court of San Bernardino Judicial District County of San Bernardino, State of California.

J. R. TRUSLER.
Clerk of the Municipal Court of San Bernardino Judicial District County of San Bernardino, State of California.

By Peggy Trusler, Deputy

PA 1432—10M—12-59 SBMC

MUNICIPAL COURT OF SAN BERNARDINO JUDICIAL DISTRICT

F 8754

HON. J. B. LAWRENCE, JUDGE VIVIAN G. JONES COURT CLERK;

AND THE FOLLOWING PROCEEDINGS WERE HAD:

F. 8754 PEOPLE vs. LUCILLE MARIE MILLER

CHARGE: MURDER (P.C. 187)

Defendant is present in court

Defendant gives true name as charged

Defendant duly arraigned and informed of all legal rights

~~Attorney and defendant duly waives arraignment and informing of legal rights~~

Defendant will hire Attorney ~~Court appoints Attorney~~

Preliminary hearing set for 10/23/64 @ 9 AM

(VS) (Cont'd

The defendant's Motion to admit to bail is denied.

I CERTIFY THAT THE FOREGOING MINUTES ARE CORRECT

AND WERE ENTERED ON ..... DAY OF OCT 13 1964, 19.....

Court Clerk

DIVISION B DATE:

I, RUDOLPH L. CORONA, Clerk and Administrative Officer of the Municipal Court, San Bernardino Judicial District, County of San Bernardino, State of California, hereby certify the foregoing instrument to be a full, true and correct copy of the original now on file in my office.

Dated October 15 1967

RUDOLPH L. CORONA, Clerk

By Deputy

MUNICIPAL COURT SAN BERNARDINO COUNTY EUREKA SAN BERNARDINO JUDICIAL DISTRICT

Attorney's Stationery Supply Co. — L 08 — 1675 — 193

MUNICIPAL COURT OF SAN BERNARDINO JUDICIAL DISTRICT

F 8754 F 8754

Peo. Vs. LUCILLE MARIE MILLER

Charge: MURDER (P.C. 187)

DIV. B CONVENED AT 11:10 A M:

HON. J. B. LAWRENCE JUDGE; A. SPIOTTO COURT CLERK

DEP. DIST ATTY. Don Turner ; DEFENDANT with 1

COURT REPORTER —— ; King BAILIFF

THE FOLLOWING PROCEEDINGS WERE HAD:

On motion DDA Turner case dismissed in view fact deft indicted by Grand Jury. Release Issued

I CERTIFY THAT THE FOREGOING MINUTES ARE CORRECT

AND WERE ENTERED ON 21 DAY OF October 1964

A. Spiotto

Court Clerk

Page 1 of 1 pages. DIVISION B DATE: OCT 21 1964

MUNICIPAL COURT SAN BERNARDINO COUNTY EUREKA SAN BERNARDINO JUDICIAL DISTRICT

I, RUDOLPH L. CORONA, Clerk and Administrative Officer of the Municipal Court, San Bernardino Judicial District, County of San Bernardino, State of California, hereby certify the foregoing instrument to be a full, true and correct copy of the original now on file in my office.

Dated October 18 1967

RUDOLPH L. CORONA, Clerk

By [illegible] Deputy

LIBRARY
PREME COURT. U. S.

FILED
FEB 29 1968
CLERK

IN THE

Supreme Court of the United States

October Term, 1967
No. 154

LUCILLE MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

APPENDIX TO BRIEF FOR THE RESPONDENT.

THOMAS C. LYNCH,
Attorney General,
WILLIAM E. JAMES,
Assistant Attorney General,
PHILIP C. GRIFFIN,
Deputy Attorney General,
600 State Building,
Los Angeles, Calif. 90012,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

IN THE

Supreme Court of the United States

October Term 1967
No. 154

LUCILLE MILLER,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California.

APPENDIX TO BRIEF FOR THE RESPONDENT.

"Q On more than one occasion, sir?

A Yes.

Q Do you recall about when she first discussed this relationship?

A Oh, I would say approximately several months prior to Dr. Miller's passing.

Q Let's see. Dr. Miller died on October 8th. May, June?

A My memory is really that I couldn't guess it within three or six months, either. [768]*

Q (By Mr. Turner) All right, fine.

A These were more in the nature of just general discussions about everything and we discussed her re-

*Page numbers in brackets are to the original Transcript.

lationship with Mr. Hayton, as well. On one occasion, was in our home, I think, which was about a month after another, which was when we were at our beach trailer on another occasion. The particular date I couldn't set on either of these. [769]

Q What was said on that occasion by Mrs. Miller concerning her relationship with Mr. Hayton?

A I don't remember. This is all I can remember is what I think I said. I don't recall what she said.

Q Did she tell you that she was having an affair with Mr. Hayton at that time?

A I don't think she used those words.

Q Did she say that, though?

A I don't remember if she did. I can remember at the beach trailer some rather direct advice I gave, which was more in the form of not counseling or discussion, but, rather, rather, oh, rather direct advice.

Q Was that in connection with her relationship to Mr. Hayton?

A Yes.

Q What did you tell her at that time.

A Yes. The discussion at that time, I think, pertained to [770] "just how much—this is the part I can recall, at least, although there were many more aspects to it. Just how much of their friendship together was sincere on his part, and how much was—and my feeling was at that time that the—

THE COURT: Is this what you told her, sir?

A Well, —

THE COURT: You were asked to give the conversation.

A This is what I told her. I can only say my general impressions. My general conversation towards her was that I didn't think that the romance, if such existed,

was sincere on his part. I think that is about how I said it. [771]

A I think that Mrs. Miller made the statement about the fact that it was sincere on her part, although I don't recall that she used the word here stated.

Q What did she say was sincere on her part, sir?

A She gave me the impression that the situation was sincere on her part. That it was not—

Q That is the situation with Mr. Hayton?

A Yes, uh-huh.

Q Did she use the word 'love'?

A I don't know. I presume that feelings were along that line, but I don't know if she used that word. Also, I probably told her, too, that it was my best advice to forget about it.

Yes, I think those were the two statements here that I omitted. [778]

A Many times.

Q Did she in those phone calls ever discuss with you her personal affairs as distinguished from your business affairs with the home?

A Yes, sir.

Q Specifically, in her phone conversations with you, did she ever discuss with you her interest in Attorney Hayton?

A Yes, sir.

Q Now, you say that you completed the home in March and you finally completed all connection with the building and paying for the home in June of '64?

A That's correct.

Q Did Mrs. Miller continue to call you on the telephone concerning her personal interests in Mr. Hayton after that [827] "time?

A. Yes, sir.

Q At that time were you and Mr. Hayton engaged in a business enterprise together?

Q June, 1964, were you and Mr. Hayton engaged in a business enterprise together?

A Yes, we were.

Q Now, between June and October of 1964, did Mrs. Miller ever ask you to intercede with Mr. Hayton for her?

A Yes, she did.

Q Did she do this once or more than once?

A On several occasions.

Q Did Mrs. Miller at anytime ever discuss with you her like [828] "or dislike for her husband Dr. Miller?

A Yes, she did.

Q Do you recall when she first brought up the subject of her feelings toward her husband, approximately?

A It was rather early in the course of building their home.

Q That is in the early part of 1964?

A Would be early in '64, yes.

Q What did she say at that time concerning her like or dislike for her husband?

A She gave me—she said that he was a very principled individual.

Q By that meaning high principles?

A High principles. And that with reference to her financial dealings, that they didn't see eye to eye.

Q My specific question, sir, is did she indicate to you her personal feelings toward her husband?

A Yes. She said something about her dislike.

Q For her husband?

A Yes.

Q All right. Now, as time went on, you have indicated you had many conversations with her. Did she at later times discuss with you her feelings toward her husband?

A Yes, sir, she did.

Q What did she say? [829]

A She said as a result of a question I posed to her that she really didn't care what he thought about it and that—

Q Do you remember the words?

A He had more or less cut himself off from her and if he tried to do anything about it, he'd get his.

Q Now, during this time, the time that you were building the house, did she indicate to you her feelings toward Mr. Hayton?

A Yes, she did.

Q What did she say in that regard?

A. She said that for some time they had been friends; they had lived in the community, and that she admired Mr. Hayton very much, his abilities as a practicing attorney; she injoyed [*sic*] the same social contracts that he enjoyed, and enjoyed that activity, and they were quite close friends.

Q Now, at anytime later and up to an [*sic*] including June of 1964, did she ever indicate to you further her personal feelings about Mr. Hayton, specifically as to whether or not she [830] 'loved him'?

A Yes, she did.

Q What did she say?

A She said that she had lost any affection whatsoever for her husband, and that she did in fact love Mr. Hayton, and if circumstances were such, she would like to marry him.

Q Did she ever tell you whether or not she had had any conversations with Mrs. Hayton about Mrs. Hayton's marriage to Mr. Hayton?

A Yes, she did.

Q What did she say in that regard?

A That Mrs. Hayton was—had come to her on occasions to discuss their marriage; that she had advised Mrs. Hayton and that she had been quite close to them discussing their problems; she cared for the children and interceded in their matrimonial difficulties. [831]

Q Did she ever tell you whether or not she had discussed with Mrs. Hayton the possibilities of Mrs. Hayton getting a divorce?

A Yes, sir; she did.

Q What did she say in that regard?

A She said that she had suggested this and—

Q (By Mr. Turner) Now, did there come a time when Mrs. Miller indicated to you that she was having difficulty getting to talk to Mr. Hayton?

A Yes, sir.

Q And did she ask you to intercede with him for her?

A She did.

Q. What did she say in this regard?

A She recited the difficulties that she had reaching him through the home, through the office. That the girls wouldn't let her through and she thought he was there, and asked me to carry messages to him, which I did.

Q You were aware that at one time she filed for divorce against Dr. Miller?

A I was.

"MR. TURNER: Excuse me just a minute.

At this time, your Honor, I offer in evidence a certified copy of the Complaint for Divorce, [832] 'Lu-

cille Miller versus Gordon Miller, No. 123643,' showing it was filed with the Clerk of the Superior Court July 8th, 1964.

"MR. FOLEY: I have no objection, your Honor, to the fact that it is a certified copy. I have continuing objections as to its relevancy, its materiality, and its competency in this particular proceeding.

"THE COURT: Very well. The objection is overruled. It may be admitted.

"MR. TURNER: What number is that?

"THE CLERK: No. 44.

"THE COURT: Plaintiff's 44.

Q (By Mr. Turner) Now, after this divorce was filed on July 8th, you were aware that eventually she and her husband resumed living together?

A Yes, sir.

Q Did she ever tell you why they resumed living together?

A Yes, sir; she did.

Q What did she say?

A She said that if she couldn't have Mr. Hayden, at least, the man with a $25,000 a year income was better than nothing.

Q Do you recall sometime early in August of 1964, Mrs. Miller telephoned you at your home and discussed a letter she had received from Mr. Hayton?

A Yes, sir. [833]

'Some. Oh, dear. Do you want to hear a letter I got today in the mail?

'Yea'.

'D[illegible] you hear? Did Marilyn tell you?

'No.

'No. Now, dig—a—what do they call it? What's the opening part of the letter, the salutation? Yeah, I

guess it is. "Dear Mrs. Miller." That part is very important. "After careful review of your case, I do not feel that I desire to represent you or your daughter, Debbie Miller, in connection with this accident. I would, therefore, suggest that you discuss this matter with an attorney of your choosing. If you would then have this attorney contact me or my investigator, I'll be glad to supply him with the pertinent information and documents in your file, which would be helpful to him in further legal representation. May I remind you that insofar as your legal rights are concerned, any legal action must be [851] filed within one year from the date of the accident, otherwise, you will be precluded from making any claims for your injuries or damages. Very truly yours, Arthwell C. Hayton." And he didn't even sign it. It's someone else's writing.

'Well, I've heard it all.

'Huh?

'I've heard it all.

'Isn't that something? He really went away with a degree of hate, didn't he?

'He—he's a little—he didn't tell me a word about it, Lucille, not a word.

'He didn't?

'No.

'I wonder how come. Did you get a chance to say anything to him at all on the way in?

'Very, very much on the surface, because there were others present, so, I didn't have much of an opportunity.

'Isn't that—well, I think it's—I think it's really a good thing in a way if he doesn't handle the case, not because he did this in anger. Apparently he thought I was going to do this, and he was going to beat me to the draw, you know, and I think it's just as well he

doesn't handle it, but I just about cracked up when I got that letter—"Dear Mrs. Miller." I really—

'Rather formal, isn't it? [852]

'Yes. I'm really surprised that he would give me the satisfaction that I had gotten to him that much, you know?

'Yeah, well, boy, he's turned down a piece of a fee there, too.

'Yeah, well.

'Unless he was going to do it for you for free. I imagine you'll get a pretty good chunk of money out of that thing.

'Yeah, I don't know; I just don't know. The thing of it is, if he would just talk to me. Did you tell him that Cork and I have gone back together? [853]

'Oh, I don't know what to do with Arthwell, Irwin. You hate to end anything with this much hate, you know?

'Uh-huh.

'And I know if he'd talk to me, we could straighten it out, but if he's just going to hang up the phone on me and refuse to talk to me, there isn't much you can do, you know. I don't know whether if I was with him in person, if I could get anywhere with him or not. I just—I just don't know because he's never been like this in all the years that I've known him. Is this typical? Is this something in him you know?

'No. No, I've never seen him angry or anything. He's always been very pleasant, and that's why he's so well liked, because he has a very pleasing personality.

'Yeah, well, I've never considered him all that [855] Beloud tipped his hat to him, you know, and—but as I say, if he won't even talk, but I just wondered if he'd said anything to you on the way in at all. Well, listen,

when you called me from his office and said you were coming over, what were you coming over for?

'Friday? [856]

'Yeah.

'Oh, he—he'd decided that he wanted to get together and have a little chat with you.

'Oh? He had?

'Yeah. Yeah, but he wanted me to be along, see?

'Oh?

'And this has gone one [*sic*], oh, for about a week, a week and a half.

'He's wanted to have a little chat with me?

'Yeah. Yeah, I don't know whether—what the contents of the chat was going to be about. He hasn't divulged that. He wanted me to come along, and I said, Arthwell, I don't want to get in a hassle, you know?

'Uh-huh.

'And he said, Oh, no; it won't be a hassle, and I just tried to steer clear of the whole thing, and say, look, you—if you've got fences to mend, do it yourself, or whatever, you know?

'Well, see that—well, that's why he wanted to come down to the beach, was it?

'Right. Right.

'So, it wasn't,—

'And, then—

'It wasn't friendly then.

'Then—well, he appeared that way.

'Hm-m-m. [857]

'I really can't figure it. He's very mixed up; he's very confused. So,

'Well, so, Friday, he decided that he would talk to me?

'Yeah. Yeah.

'Oh, what a nut! Well, I wonder when he sent this letter off—what time of the day? Well, this would have to be after that because this was sent from the San Bernardino Office, and you were at the Loma Linda office.

'Right.

'So he sent this off after that, then. Well, did he tell you what was said on the phone the night before?

'No, huh-uh. [858]'

'I think so, too, but I—I don't know. I just thought I'd see if anything—I just don't know what he wants to talk to me about that he'd have to talk in front of you. I just can't figure it. Can you?

'Well, now, that you mention that letter, I was wondering if, you know, he says that he doesn't want to be bothered. I know that the situation down at the boat ~~there might~~ that night [LG] really got him.

'Yeah. [860]

'He doesn't think there's any humor in it at all.

'Uh-huh.

'And whether he has re-thought of that, I don't know, and I—I think that you, you pose to him a threat on his security, his well being, and his reputation, etc., and so, for the time being, I think he wants to run away from it.

'Well, you know what I did to him. You see, I called him, when he was so nasty to me that morning on the phone—for no reason, you know? No reason at all, as I had called you, and then, when I didn't get you, I asked for him, and I was just being silly; I was back with Cork, you know, and he was just—you know—I mean, what's more childish than, "No, I don't love you, and I never did." You know? Nothing sounds

more juvenile, really, and so, he was just nasty, just nasty, nasty for no reason, and I wasn't expecting him at all, and so then, that, you know, you came in then, and I said I'd like to talk to you, when he was so nasty. He said, "I won't be available" So, I called him that night, just on purpose. Of course, I know how mad this makes him, you know, and so, I said I'd like to talk to you tonight, and he said "where?" And you know, the thing of it is, Irwin, he's scared to death to face it, because he's afraid he'll weaken if he sees me. I think that's what it is. [861]

'Well, that's a possibility.

'And he said, "Where?" And then, the minute he said it, you see, he's told me, he said, whenever I talk to you or see you, you get me to do and say things that I don't want to say, so, you see, he feels like I am a threat to his stubbornness, [sic] you know? And so, he said, "Where?" And just as soon, he said, "No, I'm not seeing you." And I said, "You better." Just develish, [*sic*] you know, and so, he hung up on me. So, I dialed him right back—talk about two children. I dialed him right back, and I said, "If you'd like the Minister and everybody else up there to know what Elaine said the night she died, and see a receipt from a motel and a few other things, little boy, you just keep this up." He said, "Don't you threaten me, or you'll wish you'd never heard of Arthwell Hayton." He was just oh, he was simply enraged, because I did threaten him, you know, and he was just absolutely in a rage, and so, I do think that he thinks that I'm a threat to his well being and security and you know, I did—when I went out with him the week after Elaine died—it was about a week later, and you know, I—I was

crazy about him, but I never trusted him—never, and so —I think you know this, don't you?

'What?

'That I never trusted him. [862]

'Oh, I had a feeling; I had that feeling that you didn't.

'And so, I said to him,—you know these tissue paper type receipts, you know, you get?

'Yeah, uh-huh.

'I said—Mary was at the house—and I said, you better throw that out, and so, he did, and when he turned around, I took it, and so, I have that, and then, I'll tell you something else—you'll never tell him this, will you?

No. No.

'One time about March—the end of February or March—I just—oh, I don't know, I just was real suspicious of the whole thing, and I thought,—I noticed Art had two sides to him, and if he ever decided to be a bastard and turn on me and say I never said anything, you know, and try to get out of it, so, I have a friend who runs—a very good—is someone on your line?

'No, huh-uh, I don't know what that was.

'A very good, big photography place, you know, with tapes and everything, and so, he followed me out when I was meeting Arthwell and waited until we were out of the way, and then he put a tape recorder about the size of a peanut box under my seat in the back of the Cadillac.

'Yeah? [863]

'And he placed the mike kind of—oh, I could show you if I had the car, you know.

'You're kidding!

'Oh, I'm not, and I'll tell you the conversation because I went back and played it back to myself the other day, and I'd forgetten some of the things in it, but anyway, I,—so, I didn't get a chance to start the darn thing, so I couldn't stay in the car, so, I had to leave Arthwell and give another running stab at getting the thing turned on. So, as I went to get out of the car, his car to my car, I turned it on so it ran for ten or—ten minutes anyway, with nothing on it, and then, I came back, and I got in the car, and I said to him, I said, Arthwell, I just feel like I'm being used. Of course, I can't have an affair anyway, Irwin. I'm just not the type at all—my particular make up, and I get all involved, and it's not worth it, so I said, I feel terribly insecure, and I feel like I'm being used, and so, he started a conversation by saying he could tell exactly what I was thinking, I was just—he didn't start the conversation; no, the first thing he said was—he started sucking his thumb, and he said, "I love you. I have for a long time. This isn't something that happened yesterday." He said, "I'd love to have you for my wife. I'd marry you tomorrow if I could. I don't love Elaine. He'd love to hear that played back, wouldn't [864] he? And then it went on, and we talked for about forty-five minutes. In fact, we ran the tape right down because it was an hour, and, of course, I couldn't turn it. Then this kid had to follow him all the way back—I forget if it was San Bernardino or Redlands—wait til he went in, and then get this thing out of the car, and so, anyway, I just thought, just in case, you know, he ever pulls this "I never . . ." and the things that he said, you just don't say when you're just going out. You know?

'Yeah, that would be just a little incriminating, wouldn't it?

'Just a little incriminating. It really is. Because you don't tell a woman that you just don't love your wife, and he went on, and he talked. He said that he thought that his—oh, he went on about his affair with Bonnie, and how Elaine,—I'd forgotten a lot of this until I played it back—how Elaine would—he said I'd go in, and he said she'd cry and she'd vomit, and he said I feel I just want to take poison. He said I could just—oh, and I said to him then, I said, oh, Arthwell, you never could! He said, you know I like life too well, but that's just how you feel. [865]

'He said, I've thought and thought and thought about getting a divorce and marrying you, but I just feel at this age in my life, to change all my way of life that I wouldn't be happy, and I would come home and eventually, I wouldn't be happy, and it would get to you and you wouldn't be happy. I think this conversation would be pretty incriminating. And, so, anyway, he threatened me right back, but I know the one ~~man~~ main—[LG] threat that he has on me, that I could just say that he's bitter and making it up, because he can't prove it. He has no proof for the one thing he has on me. None.

'Huh.

'But I've got him coming and going, and the pathetic part of it is, if he would just talk to me and be halfway a human being. . . . I'd apologize for that thing down at the boat, you know? If he'd just go—I think if he knew what I had on him, he might think twice. You know?

'Yeah, he might. But you just floored me the other day when I called, when you said about this gal. I can't believe it. I just can't believe it.

'Well, I don't know. I had no idea; he never mentioned it to me. I thought maybe—

'Something like that just doesn't go away.

'Well, I know. That's why I think the man is acting like such—this is one thing I've attributed to his acting like such a bastard. I'd thought that he had that pressure [866] on him on top of everything else. And Elaine said to this girl—I'd forgot—but you know what Elaine said to this girl? She said, well, she said, you know, she said, I was a virgin when I married Arthwell. In other words, don't give him all the blame, you know?

" 'Uh-huh.

'Huh?

'Yeah, I know what you mean, but you know, if he'd had a —if he'd gotten someone pregnant, they would be around by now, looking for handouts?

'You don't think that they have?

'Oh, I'm sure not.

'You don't think so, huh?'

'Huh-uh.

'Would he tell you?'

'Well, man, I know everything else. He may pick that one thing to—

'But he hadn't told you anything about me till I did, had he?

'No. No, that's right.

'I don't know, Irwin. I have no idea. None. If Elaine had lived, we'd have probably known, because she was meeting her that next Monday, and Elaine even talked to me about adopting the baby. She said if she won't have an abor—and she said to me, "why did she contact me?" And she said—she even talked to me about adopting the baby, [867] so apparently,—I

don't know. Maybe, they were—it's not something Elaine made up. She called me right after she got the phone call that Thursday, but she didn't tell me what it was til that night, because then I called Arthwell—as soon as she called me, I thought, oh, oh, you know—she was upset, and I thought, oh, she knows about us, so, I called Arthwell, and he said, no, he said, I know what's wrong. He said you meet me for a cocktail, so, you know—

'Well, did he discuss that with you then?

'Oh, gosh, no. So, I met him for a cocktail, and he told me all the things that'd gone wrong that week, and how she'd cried after she'd been here and thought that he liked me, and then the things—you were involved in some of the other things that happened that week, you know? When you went to that press conference with him, and you went into L. A. one night, and so on, and so forth. She was upset over all these things, and he told me all these things, and then, when I saw her, she, you know, made me promise I wouldn't tell him this, and then, when she died that morning, I figured, well, if he knows she know [*sic*] this, there'll be no doubt in his mind it was suicide, you know? So, I never told him, and, but I don't know a thing about it. He never mentioned it to me either, Irwin, not a word, and I never—I've never tried to pump him about it.

'Well, the thing that just floors me is that she called [868] you to come all the way from your house, to come over to Loma Linda, just to discuss this. Why didn't she tell you on the phone?

'I don't know. I don't know. With that Bonnie bit, the same thing happened. We didn't talk—well, we talked on the phone, but a good bit of the time, she would end up at my door, or I'd meet her over there,

and we'd have lunch or something, you know? Because she wanted me to come over then when she called me. I think she had Jack there or something. She wanted me to come over, and I couldn't, but I said I can come tonight, you know?

'Uh-huh.

'And then, when she called that Friday, she wanted me to go all the way back over there to get those kids. She didn't offer to bring them up here. Now, Sandy, answered the phone, and she—but I feel if he knew that, there wouldn't be much doubt in his mind as to what happened.

'Yeah. Yeah. Well, I don't know whether that was someone just playing a prank, or whether there was some truth to it.

'Well, I don't either. That's a hell of a prank to pull, because Elaine was innocent, and Elaine did nothing to bring that kind of stuff on her.

'That may be, but there've been quite a few such pranks pulled, and I don't know, I don't know what to think at this point.

'What do you mean "quite a few such pranks pulled?" [869]

'Well, she used to get quite a few calls. That's why they had an unlisted number, you know.

'No, I didn't know this.

'Oh, yeah. Yeah.

'She got only one call that I ever knew of. Did she get more than that?

'Yeah, she got tipped off on this Bonnie-thing. Someone called her and told her on that. How else would she find out?

'Private detectives.

'You think she actually hired one?

'I've always known how she found out about Bonnie, Irwin, but I knew that Arthwell would probably stay with her for about five minutes on top of everything else, if he ever knew. She wasn't phoned about Bonnie.

'Well, that's what he thinks.

'I know, and you just leave him thinking that, all right?

'All right. I have no—no point in bringing up the dead.

'No. I told her at the time, I said he is the kind of man—it's just like with what I did down at the boat—I did that on purpose to save myself from letting my heart do something crazy and getting me in a mess. I think you know that.

'Uh-huh.

'I knew if I did that, I was finished, and it was the only way that I could be sure, I'd have the brains to be finished. [870] I mean, I don't like the idea of ending up his hating me like this, you know, this hate, but I knew that boat deal with a man like him would be the living end, and I can prove it by the fact I never let Elaine—let him know some of the thing [*sic*] that she did. In fact, she was all ready to have a private detective on him again.

'Where did she get the money for it?

'She had access to the check book all the time; all you have to do is overwrite the grocery money and pay cash, dear. That's no big problem. Only a hundred dollars.

'Oh. Oh.

'That's all it was. In fact, it was under. It was eighty something.

'That's pretty cheap.

'Well, it might have been because who she was, because he knew who she was, I think, the detective that did it, or of her, and so, she wanted to—you know, she wanted to go out herself and chase him down, just like I did, and just make a big scene, and I wouldn't let her. I just had a fit. I said, you want to make a fool of yourself and humiliate yourself in front of the woman, if there is one, you know? I said you can't do that. I just wonder if she didn't tell Arthwell she got calls when she didn't because I only know of one phone call she ever got, and she called me as soon as she got it.

'Well, it's something that we'll probably never know. [871]

'Well, that's very true. We probably won't, but boy, I could get that little boy coming and going, and he hasn't got one thing on me that he can prove. I mean, I've got concrete—he has nothing concrete. He has something that he knows he just couldn't prove in any way, shape or form now. I just don't know why an attorney wouldn't have the brains to play it smart.

'Well, I think that everybody is vulnerable at one time or another, and—I've been reading some political paper back here, and it shows how people do such stupid things. It's not good sense, and it's hard to explain—

'Yeah, well, I think that with him, that he's just turned to absolute hate, where I'm concerned, you know.

'Well, I wouldn't say that myself. I would say that you, at this point, proved to be an embarrassment to him, in a different connotation of the word, more an irritation than an embarrassment, and it reminds him of things he's trying to put out of his mind. It's affecting his legal judgment, and so, I think what he's doing is trying to separate himself at this point.

'Yeah.

'And I think that, as when Bonnie left the office, eventually, the whole staff turned over, I think that he'll probably go through this complete change with everybody.

'You do?

'Oh, yes. Yeah. Yeah. This is normal. This is what [872] people do.

" 'You mean because of Elaine?

'The whole situation.

'Hm-m. It's too bad if he ever gives up Eleanor, don't you think?

'Yes. Yes, I do. Well, that would probably be the last.

'Uh-huh.

'But I think there'll be a whole new change in friends and everything, and so, I think that probably you—you're one of the first, you see?

'Yeah. Well, it might be the best thing for him. I don't know. Bob Peach won't like it if he gets changed over.

'No. No.

'Do you think he will?

'Well, I have never yet seen a law firm with an investigator makes the grade that he stays there, and I've known several investigators that'sve [*sic*] become attorneys.

'Do you think that Arthwell will turn on you eventually, too, Irwin?

'Oh, I wouldn't put it that way. I'd just say that we'll probably reach a point where we don't compliment each other, and decide to go our separate ways.

'Well, Marilyn says he's not—he's making quite a point of ignoring her.

'Oh, I think—I think that's being too sensitive. Right now, she's particularly sensitive. [873]

" 'Hm-m. Is she there?

'Not in the room. No. So, but I think that this is probably one reason why he'd like Terry to go away, too. You know?

'Uh-huh.

'He's trying to make a clean break and a clean start, and I think this is what he wanted to tell you, and but needed a little moral support.

'Yeah, you said that, in so many words before.

'Huh?

'You said that in so many words before, you know—that he didn't have the—the courage, I mean, let's fact [*sic*] it. Sure, I could probably tell a lot of people a lot of things, too, but when it comes right down to it, may [*sic*] I wouldn't, you know?

'Yeah, well—

'Especially if you've been intimate with a person, it makes it that much more difficult. She says, oh, you remember the way we used to—Ah-hah, yeah, sure I do, so that's the situation.

'Well, his emotional entanglement with me is over, as of when I went back to Cork. In fact, it was over, as of the night of the boat, you know? And—

'Is Cork living at home, now?

'Yeah.

'Oh. [874]

" 'Yeah.

'Is he home tonight?

'He took the children dow [*sic*] to church. [LG]

'And you didn't go?

'No.

'You're naughty.

'I didn't, but he took them down, but I don't know. I don't know whether to let him—the thing of it is, if you end up friends with someone—we never saw each other that often anyway, we probably once every two or three months, we'd have lunch together, you know, and all the seeing was always on his part. 90% of the time, I'll say it that way, he was the one that called. In fact, the last time they were here, he invited himself, you know?

'Well, you know, you could probably ingratiate yourself with your husband for the rest of your life, if you would say, oh, that b-a-s-t, you know?

'Oh, I showed Cork this letter he sent me.

'And what did Cork say?

'He said I'm glad to see it end on hate. I hope it stays that way.

'See? What'd I tell you?

'Yeah.

'He couldn't ask for anything better.

'Well, Cork says that if he weren't a Christian, he would kill Arthwell, because he said for years—and, of course, [875] he has a great many people over here who feel—are with him, and he said for years he worked himself into my home, and Arthwell did make the advances, Irwin. I'm not just saying that. And he played every card all the way, and Cork said, I saw him doing this, and I say you succumbing to him, and I knew that he was right from the first, and he said if I weren't a Christian and didn't he say I would kill him, and he said I don't think I'd even get sent to jail for it.

'Well, I think he would, but I don't think he's the kind that could do it anyway.

'No. Oh, he would go over there, I think, and mangle Arthwell, if I'd let him. There was a point when he'd have gone over there. He could have done

it, because he's just like Guy. They're wirey, [sic] you know, as all heck, and there was a time when he would have gone over there, I think. This isn't his nature, but there was a time when he would have gone over there and just completely mangled Arthwell, and, of course, he's done Arthwell a lot of harm because there's some pretty important poeple over there that Cork know quite well, and like ....., he knows the whole story from Cork, you know. Cork told him, and so, I mean Cork don't ever pass up an opportunity to cut Arthwell's throat, naturally, you know, and you can't blame him. You wouldn't either.

'No. That's a—it's a problem. [876]

'But I've spent an awful lot of time keeping Cork under control and did a beautiful job on it, but I'm not going to work too hard at it any more.

'Well, remember, now, just keep the bread on the waters, and don't rock the ship until we get our little project completed here.

'Irwin, I would never ~~to~~ do [LG] anything to cross you up. I only—

'No, but the general peace of mind right now, boy, until—until the first of the year, is real important, because that's maturity date of our—

'And, then, you would be all right, huh?

'Yeah. Yeah.

'Well, if he'll talk to me when he gets back, I would talk to him once, and then leave him alone. I mean, I'm back with Cork. I can't see him, you know?

'Uh-huh.

'And, I—

'Well, I think if he has a change [sic] to get away and get out of the pressures of people—other people calling him and advising him and

'Do they do this?

'So he could think for himself.

'Do people call him and advise him?

'Oh, yes. Oh, certainly.

'They do? [877]

'You know that.

'No, I didn't, Irwin.

'They have ever since the tragedy happened.

'You're kidding.

'Oh, no. No.

'I really didn't know that. Advise him about what?

'Everything, and you see, he thinks, too, that you are doing this in a way, you see, whether you mean to or not, and it just becomes another one of many irritations. He gets up in the morning, and he gets a phone call from this one and that one, trying to organize his life, and this, he resents, and even more deeply than he ever did. I've called him, I think three times, at night, and he's been very curt with me. And I can understand why, so I refrain from it. So, this is what the telephone call bit really bugs him. So, I suggest it to him, I said, look, take your phone out of the house. You don't need it there. The kids don't need it. Elaine's not at home.

'Well, why doesn't he change his unlisted number?

'Well, then, he says, well, all the folks at the church have it, and they need to get hold of me for that. So, he didn't want to do it.

'Hm-m. Well, I think he should keep his phone, but change his unlisted number, and just let the pastor have it, you know?

'Yeah, well, that doesn't work out too good either. [878] Somebody always get is, [*sic*] but anyhow, I think that given a couple of weeks, he'll be all right.

" 'Well.

'Well, I got to—

'I know if I could talk to him, I could soothe him over. I know that.

'Yeah. Yeah. I got to knock it off and go get my daughters. It's about time to play transporting.

'That's why Cork just stayed down the hill with outs last night—" [879]

Q When was it that Lucille told you that she resumed her marriage with Cork because if she couldn't have Mr. Hayton, that a man with $25,000 a year income was better than nothing? When did she tell you that?

A Seated in my car in Newport Beach. [909]

Q Mrs. Sprengel, directing your attention to the latter part of August, 1964, did you have a conversation with Mrs. Miller in which she discussed with you her relationship with Arthwell Hayton?

A Yes, I did. [924]

Q Do you remember where that conversation took place?

A On the telephone.

Q What was said?

A The one thing that I can remember is that Mrs. Miller told me in that conversation that she was holding a trump card.

Q Against whom?

A Mr. Hayton.

Q All right. Now, calling your attention to the latter part of September, did Mrs. Miller have another conversation with you in which the subject of Mr. Hayton came up?

A Yes, she did.

Q Was that first over the telephone?

A Yes, that's true.

Q What was said over the telephone?

A She called on the telephone to ask me if I would be home that afternoon. She told me she had a letter that she would like to show me if I would be home. [925]

Q Now, Mrs. Sprengel, just before the morning recess you had indicated that sometime late in September you had received a phone call from Mrs. Miller asking if you would be home that afternoon. Do you know what date that was?

A September 22nd.

Q And that afternoon then did Mrs. Miller come over to your house? [930]

A Yes.

Q Now, when she came over to your house that afternoon, did she come alone?

A Yes, she did.

Q And did she show you something?

A She showed me a letter.

Q In connection with the letter, did she make any statement to you as to what she would have done with the letter under certain circumstances?

A Under certain circumstances, she would have copies of the letter made to give to various individuals.

Q Did she indicate that she, under certain circumstances, she might have destroyed the letter?

A She did.

Q And what circumstances were those?

A If she had married Mr. Hayton.

Q In that conversation on September 22nd, did she indicate [931] her present feelings, her feelings at that time towards Mr. Hayton?

A Yes, she did.

Q What did she say in that regard?

A She told me that in spite of the things that had recently taken place, that she still loved him; that this was not the sort of thing that you could just turn off. [932]

Q You used to talk about Arthwell as well as listen to Lucille talk about him, didn't you?

A This is ture.

Q Now, in September, she, Lucille told you that in spite of all these things, that she still loved Arthwell, didn't she?

A Yes.

Q And she said that this was not the sort of thing that you [934] can turn off, is that right?

A That's correct.

Q But didn't she also say, though, that she would never marry him because he was no good?

A I believe that's true.

Q And didn't she also tell you that she would rather be married to someone who loved her than to someone like Arthwell?

A That I don't recall hearing.

Q Now, in that September meeting did she tell you that her husband had attempted suicide?

A Are you speaking of the same date?

Q I'm asking in that same conversation did she tell you that her husband had attempted suicide?

A Not in that same conversation.

Q But a week or two earlier she did?

A This is true.

Q And she also told you that her husband was taking barbituates [sic]?

A That's right.

Q Did you know Dr. Miller?

A I never met him.

Q Would you say that Lucille used to confide in you?

A Perhaps to some extent, yes.

Q You and Lucille got along very well, didn't you?

A We did. [935]

Q What did she say to you about her husband attempting suicide? Did she say 'attempted' or 'threatened'?

A I believe threatened.

Q Did she ever tell you that he had actually tried to commit suicide?

A No.

Q What did she say regarding his threats of suicide?

A She told me that he had been rather specific as to how this would take place.

Q How did she say that he was going to do it?

A That he had told her that he would drive his car to the mountains and drive it off the cliff.

Q That was sometime about the middle of September she told you that?

A That's correct. [936]

A Yes, she did.

Q That conversation, counsel just asked you if it was in the middle of September. Was it around September 6th that that took place?

A I have the date of September 15th.

Q 15th. Thank you.

A Uh-huh. [937]

Q Mr. Nourse, what is your occupation, sir?

A I'm a certified public accountant.

Q Where is your office?

Q At 445 North Gary Avenue, Pomona, California.

Q What is you phone number there?

A NA 31591.

A Among your clients this last year, did you have Dr. and Mrs. Gordon Eugene Miller?

A Yes, sir.

Q And did you handle the bookeeping for his dentist practice?

A Yes, sir.

Q When did you—when did he first employ you in that regard?

A Approximately the middle of November, 1961. [938]

Q And you were employed specifically to try to straighten out his financial affairs?

A That's correct.

Q Then you were taking care of his accounting during the years 1962, 1963 and 1964, to the date of his death, is that right?

A Yes, sir.

Q Now, going up to the year 1963, do you know what his net income before taxes was?

A May I refer to papers, sir?

Q Yes. Would you? Incidentally, you prepared a summary of his financial statement and income and expenses for the year 1963 and '64 to the date of his death and furnished [939] his wife's attorney with it, didn't you?

A I was directed to do so by letter, yes, sir.

Q Okay.

A I have a copy also for submission at this time.

Q All right. Go ahead.

A I'm sorry. I've forgotten the question, Mr. Turner.

Q The question was that was Dr. Miller's net income before taxes for the year 1963?

A $27,430.86.

Q Twenty-seven thousand what?

A Four hundred thirty dollars and eighty-six cents.

Q In other words, that's what he made out of his dental practice after he had paid all of the expenses of the dental practice, is that correct?

A That's correct.

Q What was the gross before the expenses came out?

A $53,759.21.

Q The difference then between twenty-seven some thousand and fifty-three some thousand was his expenses in connection with his dental office?

A That's correct.

Q In 1964, now, he died on October the 8th. Up to the date of his death, what was his net?

A His net income in that time before calculation for depreciation was $15,299.76.

Q And what was his gross for that period? [940]

Q Mr. Nourse, I have just a few more questions to ask you. Did you ever have a conference with Dr. and Mrs. Miller at which the amount to be set aside each month for life insurance premiums was discussed?

A Yes, sir.

Q Do you recall when that conference took place?

A On the 13th of February, 1963.

Q And at that time, did you tell Dr. and Mrs. Miller how much would have to be set aside each month in order to take care of the life insurance premiums as they came due?

A That and other contractual obligations.

Q How much did you tell them would be necessary for life insurance premiums?

A It appeared that the amount of life insurance premiums pro rated over an entire year would amount to approximately $150 per month. [952]

Q Now, sometime after the death of Mrs. Hayton along about the end of May, did you receive a phone call from Mrs. Miller asking your help in connection with Mr. Hayton?

A Yes, I did.

Q That was received at the San Bernardino law office?

A Yes, it was.

Q What was said in that phone conversation, Mrs. Brookins?

A In substance, Mrs. Miller said that she was aware that certain friends of Mr. Hayton in Loma Linda and Redlands had been talking to him against her, and that she knew I didn't have any control over what went on in the Loma Linda office, but she wanted me to do everything I could to keep [971] these people from talking to him in the San Bernardino office, and in substance—well, she said that she was desirous of marrying Mr. Hayton, and I told her that—I replied then that—I'll get my thoughts in a moment. I just can't think right offhand.

Q Would you like me to go on to something else?

A Yes, and come back to that. Let me get my thoughts.

Q Did she say anything specifically about who she wanted to be stopped from talking to Mr. Hayton?

A No, she did not expect that there was a minister apparently that had been talking to him. But I told her after she said that she was interested in marrying

Mr. Hayton, that I didn't think she had a chance. In substance this is what I said. This isn't verbatim, of course. In substance I didn't think she had a chance. First of all I didn't think he cared that much for her, and, secondly, he was too bereaved over the death of his wife at that time. She said, 'Time will tell,' and in the meantime she told me not to get any ideas about Mr. Hayton.

Q I see. Back before the death of Mrs. Hayton, did Mrs. Miller ever discuss with you her thoughts about Mrs. Hayton as a wife for Mr. Hayton?

A Yes, on one occasion.

Q What did she say?

A In substance she said she felt that they were not suited for each other personally; that she though perhaps she [972] was more suited for him than Mrs. Hayton was. And I replied in substance that everytime I had observed the two of them, Mr. and Mrs. Hayton, in the office, they appeared to be a happy and loving couple, and that he always talked very highly of Mrs. Hayton. [973]

Q Did there come a time when you stopped allowing calls from Mrs. Miller through to Mr. Hayton?

A Yes.

Q When was that?

A Around the middle of June, 1964.

Q Why did you stop letting the calls through to Mr. Hayton from Mrs. Miller?

A Mr. Hayton had instructed me that he did not want to talk to Mrs. Miller or see Mrs. Miller.

Q (By Mr. Turner) And now, after that occurred, that was around the middle of June, did you continue to receive phone calls for Mr. Hayton from Mrs. Miller?

A Numerous phone calls.

Q Did you ever tell Mrs. Miller that you had been instructed not to put her calls through?

A No, I did not.

Q Did you let the calls through?

A No, I did not.

Q After that, did she change the manner of her phone calls in an effort to get through to Mr. Hayton?

A After she realized that I had been instructed not to put the phone calls through to him, she started calling person-to-person. [974]

Q Did you let those phone-calls through?

A No, I did not.

Q Were the other girls in the office also instructed not to let such calls through?

A They were just instructed never to put a phone call through to Mr. Hayton unless it was announced first. That means long distance person-to-person calls also.

Q Mrs. Brookins, I show you a letter which has been marked Defendant's 8. Do you recognize that letter?

A Yes, I do.

Q Did you type that letter?

A Yes, sir; I did.

Q Who signed it?

A I signed it.

Q Who instructed you to write the letter?

A Mr. Hayton.

Q This is dated July 30th. Did you mail it the same day?

A The same day.

Q The purpose of this letter was to sever Mr. Hayton's client-attorney relationship with regard to her accident?

A That is right.

Q During the month of August, did Mr. Hayton go away?

A Yes, he did.

Q When did he leave?

A The day that letter was written, July 30th.

Q Was he gone from the office—well, for how long was he [975] gone from the office?

A He did not return to the office until September, the first week in September.

Q Was he back home before that?

A Yes, sir; he was.

"MR. TURNER: I have no further questions. [976]

Q Now, you testified that on one occasion, Mrs. Miller told you, 'Now, don't you get any ideas.' Do you recall testifying to that?

A Yes, sir.

Q And isn't it a fact that when she said that to you, Mrs. Brookins, she said that in a joking manner?

A Yes, sir; she did. [979].

Q You were aware last spring and summer that Mrs. Miller was interested in Mr. Hayton?

A Yes.

Q. Were you present when she tried to telephone him after he had stopped seeing her?

A Yes.

Q Did he hang up on her?

A I don't know whether he hung up on her or not.

Q On one such occasion when she had been talking to him on the telephone, did you dial him right back and suggest that he had better talk to her?

A Yes. I'm not sure I dialed him right back or talked to him—you know, I just remember talking to him, not particularly how.

Q There has been some reference, Miss Slagel, to the boat incident. You were in court yesterday when the tape recording was played?

A Yes.

Q And you heard the reference in that tape recording of the boat incident?

A Yes. [984]

Q And do you know what we mean by that?

A Yes.

Q Would you tell briefly what happened?

A At the boat?

Q Were you present at the boat incident, Miss Slagel?

A Yes.

Q Was Mrs. Miller present at the boat incident?

A Yes.

Q Did you and Mrs. Miller follow Mr. Hayton to the beach?

A Yes.

Q Where were you when you started following him?

A At a square dancing place. I don't know where.

Q And Mr. Hayton was there?

A Yes.

Q He had a date with him?

A Yes. [985]

Q When Mr. Hayton and his date left the square dance, you and Mrs. Miller followed him?

A Yes.

Q Now, who drove, you or Mrs. Miller?

A I did.

Q And you followed Mr. Hayton to where?

A Driving around Redlands first and then to the bay at Lido, near Newport.

Q Is that where Mr. Hayton kept his boat?

A Yes.

Q Did either you or Mrs. Miller untie the boat?

A I did not. Another lady was there.

Q Who was that?

A I don't know her name. She was an elderly ex-vaudeville [986] type walking her dog, and she suggested that they untie the front of the boat so it would bob up and down. She and Lucille did this.

Q When did you meet this elderly vaudeville type walking the dog?

A We were out on the beach and she came walking along and started talking to us.

Q Was this by the boat?

A Oh, 100 feet from it, approximately.

Q Did she just up and suggest that you untie the front of the boat?

A We were talking and she was rather a character, like I established, and she thought it would be funny.

Q I take it then that it was Mrs. Miller and this mysterious elderly lady that untied the boat?

A Yes. [987]

Q You say you had never seen this woman before?

A No. She alternated between Palm Springs and the beach. She said she lived both places.

Q Did you ever see her since?

A No. We just met her there.

Q Did you introduce yourself to her, get her name?

A No, we didn't that I recall. [988]

A Wenche, yes.

"THE COURT: Lat name is B-e-r-g?

"THE WITNESS: Yes.

Q You are from Norway, aren't you, Miss Berg?

A Yes, I am.

Q When did you come to this country?

A I came here May 23rd, 1964.

Q Now, are you employed at the present time?

A I don't understand.

Q Where do you work?

A I work at Lawyer Hayton's.

Q And what do you do for Mr. Hayton?

A I take care of his children and his house.

Q And his house.

A Yes.

Q When did you start working for Mr. Hayton?

A June 7th.

Q Now, from the time that you started working for Mr. Hayton on June 7th taking care of his children and his house, among other things that you did, did you answer the phone when it rang?

A Yes.

Q Did you receive a call daily or almost daily from a woman?

A Yes. [997]

Q When you first started to work and you first began to receive calls from this woman, did you know who she was?

A No, I didn't know her, but I know it was the same voice every day.

Q I see. Now, later on did you come to know who that woman was?

A Yes.

Q Who was it?

A It was Mrs. Miller.

Q Now, when you first started to work for Mr. Hayton on June 7th, what was his home telephone number?

A It was 7945435.

Q When did you actually first see Mrs. Miller?

A It was the last days of June.

Q Where did you see her at that time?

A At Mr. Hayton's home.

Q Where was she at the home when you first saw her?

A She came up the driveway and I met her at the back door.

Q And then what happened?

A She came and she told me that she was going to take the youngest boy to the mountains.

Q What is his name?

A Jeffery.

Q And had you been advised of this ahead of time by anyone?

A No, I didn't know about it at all.

Q Okay. Then what happened? [998]

A And the girl Terry, she—I asked her what this was about and she—

Q Did Mrs. Miller take Jeffery with her?

A Yes, she did.

Q Did she tell you where she was taking Jeffery?

A She told me she was going to take him to the mountains.

Q Did she say were in the mountains?

A No.

Q Was Mr. Hayton home when that happened?

A No. He was at the office.

Q Did he come home that evening?

A Yes.

Q And did you at that time tell him about it?

A Yes. He asked where Jeffery was and then I told him, and he didn't know about it.

Q Okay. Now, when did you see Jeffery again?

A It was about a week later on.

Q After that did you receive orders not to let Mrs. Miller talk to the children?

A Yes.

Q Did Mrs. Miller continue to telephone after that?

A Yes, she did.

Q Was she told that she couldn't talk to the children? [999]

A Yes.

Q And did she continue to call after that?

A Yes, she did.

Q Were you always able to recognize her voice?

A Yes, I did recognize her.

Q Now, Mr. Hayton went away for a couple of weeks, didn't he?

A Yes, he did.

Q When was that?

A It was last days of July.

Q And, by the way, was the phone number at the home changed?

A We changed it a few days later on after he left.

Q And what was the new number?

A 793—

Q It's all right if you don't remember. When was it changed, now?

A It was the first days of August.

Q After the phone number was changed, did you get any more calls from Mrs. Miller?

A Not when he was away.

Q Did you get any calls from her after he came back?

A Yes, I did.

Q When was that? Do you recall?

A I don't know exactly the day, but when he came back home, I think it was in the middle of August or the late days of August. [1000]

Q Miss Berg, you started to work for Mr. Hayton on June 7th, 1964?

A Yes.

Q And in the month of June did Mrs. Miller call Mr. Hayton?

A Yes, she did.

Q And when was it Mr. Hayton first told you not to let her talk to the children or to Mr. Hayton? [1002]

"(Whereupon, the following proceedings were taken and had in Chambers, outside the presence of the Jury)

"THE COURT: First of all, let the record show that the defendant and her Counsel, and also the District Attorney's Counsel, Mr. Turner and Mr. Krug are in Chambers.

"What is the name of the witness who has just been called?

"MR. TURNER: Peggy Fisk.

"MR. FOLEY: This is the person whom I have previously referred to as Jackie Doe.

"There is a Sheriff's Office report made about this witness under the name of Jackie Doe. When we were in Chambers earlier in this case, I was demanding the names and addresses of witnesses, and Mr. Turner informed the Court and me that Jackie Doe was an undercover agent. At that time, she was working up north in Fresno somewhere. I said I wanted her address for an opportunity to talk to her before she testifies. He assured me that I would have. That she would be available at least two days before she did testify.

"I asked Mr. Turner just two days ago if she was down here. He says 'No.' I still haven't been given her address.

"Now, that is Number one. Number two: [1008] "I am going to represent to the Court also that any testimony of this witness concerning any statement made by my client would be in violation of the rule in the Dorado case. She was an undercover agent, and never informed my client of her capacity. Never advised my client of my client's right to remain silent.

"I previously had served on the District Attorney and the Sheriff of this County a demand to be present at any interrogation of my client by any agent of the Sheriff's Office. So, any testimony of this witness concerning any statement made by my client not only violates the rule in the Dorado case, but the rule in People versus Sharer as well, and also the rule in Messiah versus the United States.

"MR. TURNER: And now, I will state this: In the first place, this woman is an undercover agent working in narcotics. We used her here just previous to the incident about which she would testify. In fact, she is here today to testify in a narcotics case in another

department which is going on today. That she was in the employ of the Sheriff's Office as an undercover agent.

"And now, so far as furnishing an address, she will testify in there today that she has no address. The first time I have been able to see her since away back at the beginning was this morning. She did work in [1009] Fresno undercover. She has been between jobs. And now, she is trying to—she is negotiating with another County for similar work, and she tells me she has no address. We have contacted her when we had to get her down here for today. I intended to put her on, incidentally, a couple of days ago, but couldn't get her in before today.

"We had contacted her through the Police agency where she was working. I did furnish Counsel with the report away back in December, of her report to the Sheriff's Office. She just hasn't been available for any of us until this morning.

"Now, so far as the second part of it is concerned, and, incidentally, on that first part, I am frank to say that I had completely forgotten about anything about Mr. Foley wanting to talk to her ahead of time, and I recall now that he did.

"I have no objection at all to his coming into Chambers and talking to her ahead of time if he wants to although I don't think there is any law saying that the prosecution has to make the witness available to Counsel. I did tell Counsel away back that her name was Peggy Fisk and she was an undercover agent and told him she was working up north, and I told him where, which is all the information I had.

"Now, so far as the rest of it, the [1010] right under the Dorado case and Messiah case and the rest of

them, the right of a witness, a defendant to remain silent. It is a defendant's right, not an attorney's. The defendant may waive this right, providing the defendant does so intelligently, knowingly and understandingly. This is the gist of all of those cases.

"Now, this particular witness did not interrogate his client. She specifically told her, the testimony will be that she specifically advised Mrs. Miller not to talk. Her testimony will be that Mrs. Miller told her that her attorneys had advised her that there probably would be somebody in jail trying to pump her and Miss Fisk, as a part of her technique, I suppose, told Mrs. Miller: 'Well, you shouldn't talk to anybody except your attorneys and the Sheriff,' and, of course, she never did talk to the Sheriff, so that is beside the point.

"She stayed up in the jail with her for about a week and listened and when Mrs. Miller would talk to her, on two or three occasions, she told her 'Don't tell me about it,' but Mrs. Miller insisted on telling her. It is Mrs. Miller's right and privilege to talk, if she wants to.

"Nobody pumped her. Nobody interrogated her. No attempt was made to force her to talk at all. [1011] She did talk, and some statements which she made which are material to this case, we will desire to have her testify about them, and statements in the report which Mr. Foley saw last December.

"MR. FOLEY: All right. The Appellate and Supreme Court has said that a defense attorney not only has the right, but he has the duty to interrogate witnesses. That the prosecution cannot conceal the whereabouts of a witness.

"And now, this witness is not an ordinary witness. She is an agent of a law enforcement agency. We know that she had been in contact with Mr. Turner at

the beginning of this trial because she called him from up north wanting to know when she should come down, and I have a right to question her, not in five minutes, but a reasonable time in which to question her in order to properly cross-examine her.

"Now, as we go into this next part of it, the Dorado case and the Sharer case and those, I have got the citations out in my briefcase. I will bring them in, where I had the cases digested, but that is one of our rights as an attorney to demand to be present under the rule of the Sharer case, and this woman did not advise my client that she was a law enforcement agent. It was by trickery and device that she tried to obtain statements from my client. [1012]

"MR. TURNER: There is no law against listening, your Honor.

"MR. FOLEY: It is not a case of listening. It is a case of asking questions to—

"MR. TURNER: I am told by her that all she did was listen. She specifically advised the girl not to talk to anybody except her attorneys and the Sheriff.

"I can do this. I can withdraw her from the stand until tomorrow morning.

"THE COURT: Well, I think in view of the circumstances related that Mr. Foley was promised an opportunity to talk to this witness, I think you should withdraw her.

"MR. TURNER: Okay. I will withdraw her.

"THE COURT: Now, on the Dorado objection.

"MR. TURNER: You would have to wait and listen to the voir dire on the stand and see.

"MR. FOLEY: Let me tell you about People versus Sharer. This is a Supreme Court of the State of Cali-

fornia case which came out about the time of the Dorado case in which a defendant was—

"THE COURT: Is this the one that was up recently again.

"MR. FOLEY: No, Sharer has not been up again.

"The defendant was called in as a witness [1013] in a Grand Jury proceeding and refused to answer questions on the grounds that it may incriminate him before he went into that Grand Jury proceeding, also his attorney served upon the District Attorney and upon the Sheriff, I believe, a notice that he was not permitting his client to testify. So, his client was in there anyway and asked questions and refused to answer on the grounds that it may incriminate him, so it comes time for trial; the defendant gets up and denies the charges against him, and his testimony is such that he testifies as to his complete innocence. So what do they do? They throw back into his face the statements he made before the Grand Jury, to wit: I refuse to answer on the grounds it may incriminate me.

"MR. TURNER: That is clearly wrong.

"MR. FOLEY: Wait a minute. I am telling you that that is exactly it.

"MR. TURNER: That would be clearly wrong, and I see no relation—

"MR. FOLEY: Here is what the Court said, among other things, that since the defendant's attorney had made his demand known upon the District Attorney, they had no right to bring him into that Grand Jury for questioning.

"THE COURT: What is the citation?

"MR. FOLEY: Let me get it for you, your [1014] Honor.

"(Whereupon, Mr. Foley goes into the courtroom to procure a certain document)

"MR. TURNER: Again, we didn't bring this person in before the Grand Jury. Somebody just listened. If she wanted to talk, that is her privilege.

"MR. FOLEY: 61 Advanced Cal. Ap. [sic.]

"THE COURT: 61?

"MR. FOLEY: Right. Advanced Cal. Ap. [sic] 967.

"THE COURT: Sharer is spelled how?

"MR. FOLEY: S-h-a-r-e-r.

"THE COURT: All right. Well, I think you should withdraw this witness.

"MR. TURNER: Fine. I will put her on tomorrow morning.

"THE COURT: In the meantime, you will have the opportunity to talk to her but on the other objection, we would have to have her sworn and at least testify to the preliminary questions anyway, and have an objection made at the proper time.

"MR. FOLEY: You know that isn't right, your Honor.

"THE COURT: Unless you want me to look at this report and see what she knows. Does this report indicate?

"MR. TURNER: There has to be a foundation [1015] laid, an objection made. There is no way to—

"THE COURT: I think there would have to be. I don't see how that could be done in the absence of the Jury.

"(Whereupon, proceedings resumed in open court in the presence of the Jury)

"THE COURT: I understand you desire to withdraw this witness?

"MR. TURNER: For the time being, I request permission to withdraw Miss Fisk.

"THE COURT: You may step down.

"MR. TURNER: Thank you, Miss Fisk. [1016]

Q Would you like to wear the microphone, or can you keep your voice up?

A Yes, I can keep it up, sir.

"THE COURT: Maybe, you had better wear it.

"(The witness placing microphone around neck)

Q (By Mr. Turner) Now, you have previously testified that you are a sergeant in the Sheriff's Homicide Division, is that right?

A Yes, sir.

Q Sergeant Paterson, I believe you were present at the time that Mrs. Miller was arrested?

A Yes, sir; I was.

Q On the charge for which she is now on trial?

A Yes, sir.

Q The arrest occurred at her home, did it?

A Yes, sir.

Q On what date?

A The 8th of October.

Q About what time of day?

A I believe it was approximately 1:30. In that area, sir.

Q In the afternoon?

A Yes, sir.

Q At the time of her arrest, did you or did someone in your presence advise her of her rights?

A I advised her of her rights. [1017]

Q And what did you tell her in that regard?

A I advised her that she did not have to talk with us if she did not want to. That she could remain silent. I also advised her of her right to consult with an attorney before she talked to us.

Q Now, she was brought here to the County Jail?

A Yes, sir.

Q And she was booked into the County Jail?

A Yes, sir.

Q And during the booking process, did one of her attorneys appear?

A Yes, sir; Mr. Ward.

Q And was he permitted to talk to her?

A Yes, sir.

Q For how long, do you recall?

A Offhand, I don't recall; no, sir.

Q Was it a minute or hours, or what?

A I believe, as I recall, I left and he was still there, and that would be a matter of I'd say approximately ten minutes before I left, and he was still there.

Q I see. And now, Mr. Paterson, during the booking process, or in connection with the booking process, did you examine Mrs. Miller's purse and wallet and inventory the contents thereof?

A Some of the contents; yes, sir.

Q Did you bring with you to court some of the items that [1018] were in her purse?

A Yes, sir.

Q May I have them?

A (Complying)

Q I will return some of the items to you. I have kept out three of them, however.

I show you a business card, Arthwell C. Hayton. Was that in her purse at the time of her arrest?

A Yes, sir.

Q And I show you two what looks like place cards with some Christmas decorations on them. One says,

Arthwell and the other says, Lucille. Were those in her purse at the time of her arrest?

A Yes, sir.

Q I notice inside there appears to be a date and initial, is that your initial?

A Yes, sir.

Q And that is the date that you obtained these documents, sir?

A Yes, sir. [1019]

he said, you know, Cork could have been dead before that fire burned, and I said, 'Well, they can tell, the time of death,' and he said I don't think they can (unintelligible) and I said well, how would I have done it, and he said well, they were looking for, you know - a blow on the head or a bullet, and I said, 'well Harold, as I said, that autopsy will be completely in my favor,' and—

"'P. Did - did you discuss - you and Harold, I gather are good friends?

"'M: Uh-huh.

"'P: He's an attorney, also.

"'M: Uh-huh.

"'P: But

"'M: We're more friends than - you see, Arthwell's always been my attorney.

"'P: Uh-huh. Arthwell Hayton?

"'M: Uh-huh.

"'P: Now, did you discuss - was this brought up with Harold - the fact about Arthwell Hayton?

"'M: Huh-huh.

"'P: Did he - did you mention this to him?

"'M: You mean about - he knows about this.

"'P: Oh, I see what you mean.

"'M: My husband was his closest friend.

"'P: I see, but what I'm driving at is this: Was - [1058] well, let me go - now, you correct me if I'm wrong.

"'M: Yeah.

"'Again. You've known Arthwell Hayton oh, for eight years, I think you said. Is that right?

"'M: Uh-huh.

"'P: And you have been - prior to August. August you broke off with Arthwell Hayton, Art. Is that right?

"'M: Uh-huh.

"'P: And prior to August, you went with him for approximately six months? Is that right?

"'M: Uh-huh.

"'P: And, what I'm driving at was this discussed? No. Okay.

"'M: Huh-uh.

"'P: Okay. Now,

"'M: I don't think Harold and I - Joan and I discussed it. I, and Cork and Harold have, but I don't think Harold and I have ever discussed it.

"'P: Did - did Harold know that you - that you did not love your husband?

"'M: Uh-huh. Maybe I shouldn't have said that, because maybe I had a - as I told you, love is a word, and I certainly had something for Cork. I mean, if I let myself go, I could just shatter. I don't even think about it, because the day'll come when I have to face it, and I - I don't like [1059]

"'P: All right. Then, oh—

"'M: Now, what do you have for a personality like that? When you have them, you think you don't

love them. You don't have them, you feel, sick -LG, or something, I don't know.

"'P: Well.

"'M: I felt like Cork was rejecting me for years. I'd give anything.

"'P: You've been married—

"'M: Fifteen years.

"'P: Fifteen years, and I think in our - in talking up there, as I recall you said for fourteen of these years, you were - Again I'm looking for the right word - neglected? Is that right?

"'M: Rejected.

"'P: Rejected! I'm sorry. I'm sorry, and after you filed for this divorce, is when he -

"'M: He realized that. You see, it was his background. It wasn't that he was being cruel. It's his background and his parents - His father was German, and Cork was not raised affectionate and demonstrative feeling, and to him, it was almost sissified. It wasn't - and it wasn't until he felt he was losing me that he just came to, and decided this was something he and he could do, you know?

"'P: Uh-huh. Then, do you mind telling me, I [1060] know we discussed this, and - and - you've got to realize I'm fishing here, too. I believe I told you that, and - and this may help you, and it may not help you; I don't know. I'm trying to be fair with you. How did he first find out about - your husband - find out about you and Art Hayton?

"'M: Of course, he lived with it for years, you know? Always felt that I liked him, and after Elaine died, he pushed the panic button one night and just asked me right out, and that, I think, was when he really - the first time he really faced it.

" 'P: Now, did Elaine know about you and Art?

" 'M: Huh-uh. I don't think so.

" 'P: Did she confide in you?

" 'M:

" 'P: Was she concerned over Art's behavior with other women?

" 'M: Uh-huh.

" 'P: But she didn't know that you - that you and Art were going out?

" 'M: Well, because we had been so buddy-buddy for so many years that things were really no different on the surface, and I really don't think that this - you know.

" 'P: And Art and your husband were good friend, too: Is this— [1061]

" 'P: Let me ask you something now. How do you feel about Mr. Hayton?

" 'M: Now? LG Bah!

" 'P: About - how about insurance? Mrs. Miller? In regard to Mr. Miller. What kind of insurance did Mr. Miller have?

" 'M: He had a $20,000 policy that we'd had with Prudential - not Prudential, it was Connecticut, for [1070] years, and he had a $50,000 that he's had with Prudential, for years, and I think -I'm not positive - I - you could see he has a business man, and they run everything, and I don't go down and look through the boxes—

" 'P: You think what?

" 'M: But I think there was a policy with the - it would be small, with the Dental Association. Now, as far as I know. He never asked, consulted with me if he wanted to take some out.

" 'P: Double Indemnity?

"'M: Some of them are - I'm not - Connecticut definitely is, and I think Prudential is. I don't think the dental would be.

"'P: Now, also, his - this building that he - He's buying this building, is he not?

"'M: No, he's leasing it.

"'P: I'm sorry. He's leasing it. I was under the impression that he was buying the building.

"'M: No, everthing in it's his, but he was leasing the building.

"'P: Is this on a—

"'M: Five year leas, [*sic*] I think. I'm not positive, now, I'm not positive. I think it's—they won't lease to you usually under that length of

"'P: How as - how was the debt situation?

"'M: When he took off - when we separated in the [1071]

"SAN BERNARDINO, CALIFORNIA, FEBRUARY 4, 1965, 10:00 O'CLOCK A.M.

—oOo—

"THE COURT: Mr. Turner.

"MR. TURNER: Miss Fisk, will you take the stand, please?

"PEGGY FISK, called as a witness by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

"THE CLERK: State you name and spell it.

"THE WITNESS: Peggy Fisk, F-i-s-k.

"DIRECT EXAMINATION

"BY MR. TURNER:

Q Miss Fisk, back last October were you employed by the San Bernardino County Sheriff's Office?

A Yes, I was.

Q And were you employed as an undercover agent in connection with investigation being made by the sheriff's office at that time?

A Yes, sir.

Q Did you receive an assignment from the sheriff's office to pretend to be a prisoner booked into the County jail?

A Yes, I did. [1098]

Q And were you in fact booked into the jail just as a prisoner?

A I was.

Q When was that?

A Approximately October the 9th, sir.

Q How long did you stay in jail?

A I think until October 15th.

Q Now, while you were in jail, did you become acquainted with Lucille Miller, who is seated at the end of this table?

A Yes, I did.

Q She was also a prisoner in the County Jail at that time, Miss Fisk?

A Yes, she was.

Q Now, while you were in the County Jail, did she at anytime talk to you about herself and the reasons she was in jail?

A Yes, she did.

Q Did she ever talk to you about her husband and any domestic problems she had had?

A Yes.

Q What did she say in connection with her domestic problems with her husband?

"MR. FOLEY: If the Court please, may I ask a question on voir dire?

"THE COURT: Yes.

"VOIR DIRE EXAMINATION [1099]

"BY MR. FOLEY:

Q Did you inform Lucille Miller that you were a law enforcement agent?

A No, I did not.

Q Did you inform her of her right to remain silent?

A I told her that she should discuss this with her attorney.

Q And did you tell her that she had a right to have an attorney present when she talked to you?

A Not in so many words, no, sir.

"MR. FOLEY: Well, all right. Thank you. I have no further questions.

"DIRECT EXAMINATION (CONT'D)

"BY MR. TURNER:

Q What did she say in regard to her domestic problems?

A Pertaining to the divorce, sir?

Q Yes.

A She said that she and her husband had filed for divorce at one time but before his death they were reconciliated.

Q Did she state to you whether—well, did she state to you what her thoughts were towards her husband as to whether or not she loved him?

A She said she did not love her husband but she respected him.

Q Did she mention being interested in anyone else?

A Yes, she did. [1100]

Q Who was that?

A Mr. Hayton, Arthwell Hayton.

Q What did she say in that regard?

A She said she has always loved Mr. Hayton and still loves him.

Q Now, did she indicate what her future plans were?

A Yes, sir, she did.

Q What did she say?

A She said as soon as this mess was over, that she planned to take her daughter Debbie and the two boys away to Europe with the insurance money?

Q What did she say about the insurance money?

A She said that she would receive over a hundred thousand dollars in insurance because of the accidental death.

"MR. TURNER: I have no further questions.

"CROSS-EXAMINATION

"BY MR. FOLEY:

Q Was it late on the night of October the 9th that you were booked into the jail?

A Yes, sir, it was.

Q About what time of night was it?

A I don't recall what time, sir.

Q After 11:00 o'clock?

A I'm not sure. I said before—I think I told you last night I thought it was sometime around midnight. I'm not [1101] sure of the time.

Q And you were placed in the jail cell with Lucille?

A Yes, I was.

Q Two other girls in that cell?

A That's right.

Q Do you kow who they were?

A I met the girls, yes. I don't remember them now.

Q And did you have a conversation with Lucille at that time?

A Pertaining to this case, no, sir. I don't think so.

Q But you did have a brief conversation with her, didn't you?

A Mrs. Miller was awake when I went in there, and there was quite a bit of noise going on outside, yes, and everyone was kept awake that night.

Q And Mrs. Miller didn't get much sleep that night, did she?

A Not that I recall. I don't think anyone slept that night.

Q And that was the night of October the 9th?

A Yes, as far as I remember, the 9th.

Q Now, you were working under the direction of Capt. Bob Graefe, weren't you, when you were sent up there?

A Yes, sir, I was.

Q And also under Lt. Shepherd's direction?

A That's correct.

Q And you were told to go up there and to listen to whatever Lucille might say?

A That's correct. [1102]

Q And when you were booked in, Lucille's attorney, one of Lucille's attorneys was sitting outside that jail?

A I think so. I didn't recognize him, sir.

Q And this period of time that you were in that jail was the period of time when Lucille's attorneys were sitting around the clock, is that right?

A Yes, sir, that's correct.

Q And you saw me up there, too, didn't you?

A I think I rode the elevator with you one day, yes.

Q And you pretended that you had been placed in jail on a possession of narcotics violation isn't that right?

A That's correct.

Q And you stayed there in the jail from the 9th to the 15th, right?

A Yes, as far as I remember on the dates, sir.

Q And as you would get little bits of information from Lucille from time to time, you would give them to one of the vice officers who would come up to see you?

A That's correct.

Q But you didn't make any written notes, though, of any of these conversations, did you?

A No, sir. I couldn't in jail.

Q Now, the vice officers didn't see you everyday, did they?

A I do not know. I don't think so.

Q All right. So sometime—

A But I'm not sure of that. [1103]

Q Sometimes then when you gave them bits of information, it covered more than a day's conversations with Lucille, didn't it?

A That's correct.

Q Now, one of those days, one of the vice officers gave you a clipping out of the front page of the San Bernardino paper, didn't he?

A Yes, sir. They brought it with them and it was placed on the table.

Q And you were told by one of the vice officers to take that clipping up and show it to Lucille, weren't you?

A That's correct.

Q And that clipping was the story about Lucille being refused permission to go to her husband's funeral?

A I do not remember what the clipping said.

Q It did say something about her husband's funeral, didn't it?

A I do not remember, sir. The clipping was destroyed.

Q And when you showed that—strike that. When you went up in the jail with that clipping, you had it underneath your uniform, didn't you?

A That's correct.

Q And when you began to talk to Lucille, you removed it from underneath the uniform and told her that you had snitched it downstairs without anyone seeing you?

A That's correct. [1104]

Q And you pointed out different things in that article to Lucille, didn't you?

A I don't remember pointing out any specific things to her, no, sir.

Q And Lucille appeared to read part of that article, didn't she?

A Yes, sir.

Q And didn't you say to her, 'Look at what the press is doing to you. They are ruining you'?

A I don't remember saying anything like that.

Q Last night didn't you tell me that you could have something like that?

A I said there is a possibility that something to that form could have been said but I don't remember saying that, no, sir.

Q And in that conversation with her you told her that 'Your attorneys aren't doing you any good,' didn't you?

A I told her at one time I had an attorney which did not do me much good.

Q And you also told her that she should think about it because maybe this would happen to her?

A That's correct, I did.

Q And, of course, you were lying to her when you told her that you had an attorney who had not done you any good, is that right?

A Not necessarily, no, sir. [1105]

Q Were you or weren't you?

A No, sir, I wasn't lying to her.

Q Now, did you tell Lucille that you had talked with Frank Bland and he promised to drop the charges against you and give you a floater out of town?

A I told Mrs. Miller that I had talked to Mr. Bland and there had been a discussion concerning a floater out of the state for me.

Q Did you tell Lucille that 'I put all my trust in Mr. Bland and maybe it would do some good for you if you tried the same'?

A That is correct.

Q You told Lucille that your own father had burned to death?

A That is correct.

Q And actually he did, didn't he?

A He has burned to death, yes.

Q Did you tell Lucille that you had been shown a picture of your own father and it has bothered you the rest of your life?

A No, sir, I did not mention anything about a picture. If there was anything mentioned about a picture, it was one that was taken before my father's death, which was many years ago.

Q You told Lucille that your father had picked up a gas can by mistake instead of an oil can, is that right?

A Yes, that's correct. [1106]

Q Now, in addition to that particular instruction that was given to you, that is, to take up this newspaper and show it to Lucille, what other instructions were given to you by the vice officers in connection with Lucille?

A Mainly to listen.

Q And to talk?

A There was one occasion when I did mention something about—concerning four men from the district attorney's office in the hall which I supposedly overheard a conversation.

Q And you were told to tell her that?

A That is correct.

Q And actually you told Lucille that you had overheard a conversation in the hall between four men whom you thought to be from the district attorney's office or connected with it, and one man had turned to the other and said, 'Getting back to the Miller case, Arthwell Hayton came in and blew the top off the case'?

A That's correct.

Q That is what you told Lucille and that's what you were told to tell her?

A Yes.

Q Now, when you booked in that first night, there were four girls in the cell, right?

A Yes, sir.

Q And then the next day two of the girls were taken out of the cell? [1107]

A I do not remember when the other two were removed.

Q Then after—then that left you and Lucille all alone in that cell, right?

A That's correct.

Q Now, were any of these conversations tape recorded or bugged in any way?

A No, sir.

Q Now getting back to the conversation about the trip to Europe and the insurance, isn't it a fact that Lucille told you that when this mess is over, that she would probably move to Europe so the children wouldn't be crucified?

A So that she and her children would not be crucified,

Q Did she also tell you—strike that. She mentioned insurance money to you, isn't that right?

A That is correct.

Q Now, which day was it that she mentioned insurance money to you, 9th, 10th, 11th, 12th, 13th or 14th?

A Sir, this is very hard to say. As I tried to explain to you last night, my report was written on the 12th and partly on the 14th. There was one day she did—there were several times she mentioned the insurance.

Q Now, in between—strike that. During the nighttime Lucille would be in the cell, isn't that right, at night?

A That's correct.

Q But during the daytime wasn't—during these days wasn't [1108] she generally outside the cell sitting with me or one of my associates?

A That's correct.

Q And, of course, you don't know what I may have said to Lucille about insurance proceeds or one of my associates, do you?

A No, I do not.

Q And did Lucille—did you ask Lucille how many policies she had?

A No, sir. I don't think so. Not that I remember.

Q And the figure she gave me a vague figure, around a hundred thousand, is that what she said?

A She said it was over a hundred thousand dollars.

Q Now, she talked to you about the fire, too, didn't she?

A Yes, she did.

Q She told you she didn't know how the fire started, didn't she?

A Yes, sir, at one time she did.

Q She said when the fire started—strike that. She said when the accident happened, that everything went blank, didn't she?

A Yes, sir, she did.

Q She said she remembers that she picked up a rock and threw it through a window, didn't she?

A Yes, she did.

Q She said when she saw that she couldn't do anything for [1109] her husband, she started for a neighbor's house?

A That's correct.

Q She said she screamed for the neighbor to call the fire department, the police department and her attorney?

A That's correct.

Q She told you that her husband had been in the front seat and that he was slumped over, slumped down with a blanket around him?

A Yes, sir.

Q She told you that she had had a lot of trouble with her husband and she had filed for a divorce several months ago, didn't she?

A Yes, she did.

Q She told you that she had not seen Arthwell Hayton for approximately three months, didn't she?

A That's correct.

Q She said she was afraid that he was going to be brought into this court, didn't she?

A Yes, she did.

Q She told you that she respected her husband?

A Yes, she did.

Q Did she also tell you that she was very fond of her husband?

A She told me she did not love her husband, sir; she respected him.

Q She mentioned something to you about her husband being on [1110] barbituates [sic] or narcotics, didn't she?

A She mentioned narcotics, yes, sir.

Q You do undercover work in narcotics, don't you?

A Yes, I do.

Q So naturally you must have asked her what kind of narcotics?

A As I stated yesterday, I may have, yes.

Q What did she tell you?

A There was nothing. She said nothing about what type or kind.

Q Well, you don't remember then whether you asked her or didn't ask her, isn't that right?

A Well, like I said before, no, sir, I don't remember directly whether I asked her anything like that or not.

Q Now, there is a lot of—there is a lot about those conversations that you don't remember, isn't that right?

A That's correct.

Q And what you do remember, are you certain that it is accurate?

A Yes, sir.

Q Now, the report that was made concerning these conversations, that report wasn't typed by you, was it?

A No, it was not.

Q So you yourself have never made any report of any of those—written report of any of those conversations?

A No written report, no, sir.

Q No typed report? [1111]

A No, sir, I have not.

Q And you have refreshed your memory as to what Lucille told you from a report written by somebody else?

A That's correct.

Q You talked to Sheriff Bland during those days, too, didn't you?

A Yes, sir, I think I talked to him one time. Maybe twice. I'm not sure.

Q Did he give you any special instructions?

A Only to listen.

Q What is that?

A Only to listen.

Q Did you talk to any deputy district attorney during those days?

A I'm sorry. I can't hear you, sir.

Q Did you talk to any deputy district attorney during those days?

A I think there was one present but I'm not sure. I was very new here at this time and I didn't know very many people.

Q Did you talk to Mr. Turner during those days?

A I'm not sure of that, sir. I think I talked to him one time.

Q Now, Lucille talked to you about her daughter Debbie, too, didn't she?

A Yes, she did. [1112]

Q She told you that her daughter was beautiful; that she was very proud of her daughter, and that she loved her daughter very much, didn't she?

A That's correct.

"MR. FOLEY: Thank you. I have no further questions.

"REDIRECT EXAMINATION

"BY MR. TURNER:

Q Who did type the report, Miss Fisk?

A I think that was a secretary, Carol, downstairs in vice and narcotics.

Q Who did you give your report to?

A Mr. Shepherd, Lt. Shepherd was the one who took the report at the time.

Q He is the one who at that time was in charge of the vice and narcotics?

A Yes, he was.

Q Now, your father was not burned in an automobile, was he?

A No, he was not.

Q Fire in a house?

A That's correct.

Q And you say that he picked up a gas can instead of what?

A There was two cans, sir, one containing gasoline and one containing kerosine, [sic] an [sic] he picked up the gasoline can instead of the kerosine can and poured it into a blazing [1113] fire.

The results of that is what caused his death?

That's correct.

"MR. TURNER: I have no further questions.

"MR. FOLEY: Thank you. I have no further questions.

"MR. TURNER: Thank you very much.

"MR. FOLEY: This witness may be excused, counsel.

"MR. TURNER: Thank you.

"THE COURT: You are excused then.

(Witness excused.)

"MR. TURNER: Mr. Hayton, please.

"*ARTHWELL C. HAYTON,* called as a witness by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

"THE CLERK: State your name and spell it, please.

"THE WITNESS: Arthwell C. Hayton, H-a-y-t-o-n.

"*DIRECT EXAMINATION*

"*BY MR. TURNER:*

Q Where do you live, Mr. Hayton?

A Redlands, California. [1114]

Q Did she ever actually ask you to—did she ever actually retain you for the purpose of handling a divorce?

A She asked me to represent her in a divorce action, which I declined and told her that I did not at that time handle divorce actions, and in any event, I would not represent her due to our very close relationship.

Q When she first discussed the possibility of divorcing her husband, I take it that was several years ago?

A Yes, sir, it was. [1119]

Q Now, I take it she was just talking to you as a friend who was also a lawyer?

A Yes, sir. Usually these talks would either be in her home or possibly in our home. Occasionally in my office, but never as an attorney.

Q In these conversations did she discuss her thoughts toward her husband?

A Yes, sir.

Q What did she say in that regard?

A She told me that in substance she never really loved Cork; that she felt that it was a mistake that they were married in the first place, and she was very young at the time, and that while she had lived with her husband and had children with him, that they were never really suited for each other and that she did not feel that she could continue to live with him.

Q In those conversations did she discuss with you why she didn't go ahead and divorce him?

A Primarily—yes, she did. [1120]

Q What did she say?

A Primarily she was concerned that if she divorced him, while she thought she could get along as far as a person, she was concerned whether she could get along financially, and she discussed with me whether I thought that she could get child support and alimony sufficient to keep her and support her.

Q Did she ever suggest to you that you divorce your wife and marry her?

A Yes, she did.

Q Specifically calling your attention to April of last year, about the 20th or 21st of April, somewhere along in there, did you receive a phone call from Mrs. Miller suggesting that the two of you get together?

A Yes, I did.

Q Did you receive that call at home or at the office?

A As far as I recall, it was at my office.

Q And what did she say?

A She asked me if she could see me either in the office on that particular day—

Q Did you make some arrangements with her?

A I told her that I had appointments that day, and she asked me, well, could she see me for lunch, and I said yes, I could see her for lunch.

Q Did you have lunch with her?

A Yes, I did. [1121]

Q Where?

A At the coffee shop or the dining room at the Holiday Inn.

Q Just the two of you present at that luncheon?

A Yes. She drove from her home and I drove from my office and met her there.

Q What was said in that luncheon conversation?

A We talked of general topics and then she talked particularly in connection with my marriage and her marriage.

Q What did she say in that regard?

A She told me at that time that she had definitely decided to divorce Cork; she could not live with him any longer; that she had thought about it on other occasions but had put it off, and that now she had made a decision, and she said regardless of what would happen, that she was going to go ahead and file a divorce action. She had—she told me in substance, she said, 'I know you won't handle it for me. Who would you suggest that I go to?' And I said, 'Well, you live in the Ontario area. I would suggest that you either go to Harold Lance or Mr. Beloud,' who used to be my partner. Well, she said, 'Harold, of course, I know, and I wouldn't want him to handle it and so I'll go to Beloud.' And she further said that she just had had enough

of living with Cork; that he was completely unhappy and irrelevant in his feelings about her desires for her home, the home that they were building, and that she just could not live with him any longer. [1122]

Q In that conversation did she make any suggestion to you concerning your marriage?

A Yes, she did.

Q What did she say in that regard?

A She said, 'Arthwell, you know that over the years I have admired you and I think you are successful in your practice and I admire the—I like the social and political people that you associate with, and really Elaine does not appreciate these things like I do.'

Q Elaine is your wife?

A Elaine is my wife. And she said, 'Elaine isn't the attractive person that you should have or that you would like,' and that, 'I'm going to divorce Cork and you know how I feel about you, and I think that you should talk to Elaine and ask her to divorce her.'

Q And did you reply to that?

A Yes. I said. 'Lucille, I don't want to hear you talk like that. You know that I love Elaine. Under no circumstances would I divorce Elaine. We married each other. We have had a happy marriage. She—there may be some things that I would like to have changed in her, but I'm sure that there are some things that she would like to have changed in me. She is a wonderful mother. We have four lovely children. And I wouldn't divorce Elaine for anything in the world.'

Q Go ahead and relate what she said and what you said on [1123] this occasion?

A Well, she said, 'Look, Arthwell, Elaine really isn't suited for you.' She said, 'I've been as close any anybody with Elaine. She has felt sometimes that you

would like to her [sic] dress better or go to things with you, and she is not going to change and you are not going to really continue to be happy with her.' I said, 'Lucille, that just it not true. I love Elaine and she is a wonderful person and I would not in any way leave her.' I said, 'I have four children, and if I were in any way inclined to divorce her and marry you, what would happen to the children?' She said, 'Children are able to adjust,' and she said, 'Bill loves you and he would come with you and us, and Terry likes Debbie so much and she would come and live with us, and Elaine would have the two little children.' And I said, 'Lucille, that's just ridiculous to even talk like that.' I said, 'You know that if that were to happen, in a few months or a few years I would be doing nothing but wanting to be with my children and have all of them together, and you wouldn't be happy and I certainly wouldn't be happy.' And I said, 'Frankly, I think that you should think in terms of living and remaining with Cork. You may have your differenses but I think he is a very nice fellow and I have always liked Cork.' Well, she says, 'I can't take him any longer. I'm going to divorce him in any event,' and she said, 'I'm pretty persistent and I [1124] can wait a long time.' And I said, 'Well, you are going to have to wait a long time if you are going to wait for me because I'm not going to divorce Elaine because I love her and I have a happy family.'

Q Is that the substance of the conversation?

A Yes, sir.

Q This was on what, Tuesday or Wednesday, April 20th or 21st?

A Yes, sir, it was.

Q Now, a couple of days later, on Friday, did you go on a trip?

A Yes. I took my son Bill and five of his playmates on a weekend birthday party on our boat, the Captain's Lady, to Catalina Island.

Q Now, while you were over there, you received word that your wife had died?

A Yes, sir, I did, by radio.

Q And did you return at once home?

A The coast guard flew a plane over to the island and flew me home.

Q And did you land at a little air field? [1125]

A Yes, sir, we landed at Tri-City Air Field.

Q That is the little airport down here that is sort of between Colton and Redlands?

A Yes, sir.

Q Did some of your relatives meet you at the airport?

A Yes, sir, my sister from Riverside was there and another friend and Mrs. Miller.

Q When you got out of the plane, did Mrs. Miller speak to you?

A Yes.

Q What happened?

A Well, I was sobbing and crying, and she came over and put her arms around me and we walked over to where her car was and she asked me if she couldn't drive me home.

Q Did she?

A Yes, she did.

Q Did she help take care of your children then for the days that followed?

A Yes. When I arrived home, the other children were there and the pastor of our church was there and some of our friends were there at the home, and after —they did not know that my wife had died, and after

I told them, then Mrs. Miller took the two little children with her to her home.

Q Did she keep them at her home until the funeral?

A Yes, she did. [1126]

Q The funeral I believe was the following Thursday, is that right?

A I believe that is correct.

Q And did she bring them back for the funeral?

A Yes, sir, she brought the two children to our home and the automobile from the funeral service—from the funeral home was there for the family and we rode down to the funeral.

Q Now, from the time you returned home after your wife's death for the next few weeks about how often did Mrs. Miller come to your home?

A I remained home from the office for about two or three weeks, and during that period of time Mrs. Miller would come back and forth I would say at least on the average of once a day or once every other day, and she would either bring the children over or take the children with her.

Q Now, I believe your wife's death was April 24th?

A Yes, sir.

Q In late May or early June, sometime around the first of June, did you receive a call and a visit from a pastor of your church?

A Yes, sir, Pastor Hassenphlugg of our church in Redlands asked to see me and he came to my office in Loma Linda.

Q Now, after you—you did have a talk with him then at your office?

A Yes, I did. [1127]

Q And sometime after you had a talk with him, did you speak with Mrs. Miller on the phone?

A Yes, sir, I did.

Q By the way, during that period, month of May, did Mrs. Miller ever telephone you?

A Oh, yes. She was either a constant visitor at our home or she would telephone or talk to me.

Q Now, how long after your talk with the pastor before you next spoke with Mrs. Miller?

A Well, immediately after the pastor talked to me, sir, I—he talked to me about Mrs. Miller, and I immediately then called her on the phone. By 'immediately,' I mean sometime that day, as I recall.

Q And you spoke with her on the phone then?

A Yes, I did.

Q What was said in that conversation?

A I said, 'Lucille, the pastor has talked to me. I'm very, very concerned about what he said. He told me that he was concerned about things that you had been saying in Redlands and Loma Linda area.' I said, 'Lucille, I just don't know how you could say these things; that you have told people that I'm going to marry you and move over to your home in Alta Loma, and that's just not so and you know that that isn't so, and that other things that you are telling about our relationship. I'm very concerned about it. The pastor is concerned about it for my reputation, for that of the [1128] children, and I would just suggest that you no longer call me or come over to our home or see the children; that I certainly don't want anything to be done or said that would cause any type of question to —as far as our conduct is concerned, to give any rise to any gossip or speculation among our friends in the Loma Linda-Redlands area. I'm concerned for my reputation and that of the children.

Q What did she say?

Q Mr. Hayton, just before the morning recess you had indicated that you had had a conversation with Pastor Hassenphlugg and that after that you had talked to Mrs. Miller over the phone and you had related to her what the pastor had said, and I had just asked you what did Mrs. Miller say, and would you please answer that? [1129]

A Mrs. Miller said in substance, 'Look, Arthwell, that's one of your troubles, that you listen to those people over in Redlands and Loma Linda too much, and that if you would just stop listening to your church friends in Redlands; that they are hypocrites and supercilious, and your trouble is that you are too concerned about what they say.' And I said, 'Well, regardless of what your feelings are, Lucille, I live in Redlands and I live in Loma Linda, and my family lives here, and I'm concerned about what these people say for my sake and my children, and I don't want, therefore, to have you come over to my house anymore because I'm very concerned about the things that have been told to me that you have said to other people.'

So I take it in that conversation you told her that you didn't want her to call any more or visit any more?

A I certainly did.

Q All right. Now, shortly thereafter there has been some testimony that I think around June 5th Mrs. Miller was involved in an automobile accident, and did you hear about that?

A Yes, sir, I did.

Q And did she call you in connection with that accident?

A Yes, I received a call that she and her daughter Debbie had been in an accident. [1130]

Q And did she ask you to represent her legally in connection with the accident?

A Yes. If I remember correctly, I received a call—I'm not sure it came directly from her or whether it was relayed to me by my secretary, but in any event, the information was to me was that Mrs. Miller had requested that I visit her at the hospital where she was for at least a day or two after the accident.

Q Now, shortly thereafter did you receive a call from Mrs. Miller after she had returned home from the hospital?

A Yes, I did.

Q And as a result of that phone call, did you go to her home?

A Yes. She called me from her home and she said, 'Arthwell why didn't you come down to the hospital, to see me?' And I said, 'Well, I sent Bob Peach, my investigator, and I have all the information, and I'm very—I have the information to proceed, and I feel that your case has merit from a legal standpoint and certainly the medical information [1131] indicates that you were injured and your daughter Debbie was injured, and I'll be glad to represent you strictly on a legal basis in this matter.' And she said, 'Well, but I want to see you and will you please come on over to the house this evening?'

Q Did you?

A Yes. And I said, 'All right, I'll come over.'

Q And did you go over?

A Yes, that evening I took my son Bill and I went over to her home in Alta Loma.

Q And when you got to her home in Alta Loma, was there anybody else home?

A Her children were there. I did not see Dr. Miller. And she was in bed in her bedroom.

Q What did she say?

A She said, 'Arthwell, what is wrong as to why you will not [1132] come and see me?' And I said, 'Lucille, I made it plain to you that I do not want to see you or have you see me or have any communication with me or my children. I told you what the pastor said and I'm very concerned that so recently after my wife's death that there not be any basis for any comments or things that would reflect adversely upon me or my children, and if you want me to handle your legal matter, I'll be glad to do that, but I do not want to have any contact in any type of social or personal way.'

Q All right. When is the next time that you heard from her?

A I believe that she called me occasionally during the next two or three weeks at either my Loma Linda office or my San Bernardino office, and at that time the calls had—I had not instructed my secretary not to put the calls off but I would be rather curt with her and not discuss anything further with her.

Q Well, specifically, about a week after your visit to her home with your son, as you have just described, did you receive a phone call from her in which she referred to the possibility of a visit at the beach?

A Yes. That was at my home.

Q What was said in that conversation?

A She said, 'Arthwell, certainly by now any gossip or anything that anybody may have said at Redlands has died down, and Loma Linda, and I would like to see you,' and she said, 'Please see me and please let's go down to the beach [1133] together. I'm going to be down for a week or so at Eddie Ford's trailer—that's

Dr. Ford—and Yolanda and I are going to be down there, and please come on down and let's spend some time down there together.'

Q What did you tell her?

A I said, 'Lucille, I, under no circumstances, want to see you. I have made it plain to you that I do not want to see you socially, and certainly I would not go down to the beach or any other place and meet you.'

Q Now, sometime shortly after that there has been some testimony that around the middle of June there was what has been described as a boat incident. Do you know to what I refer?

A Yes, I do, sir.

Q Where did you go?

A We had been invited to a western type party in the San Bernardino area up at—up near Highland, in the Del Rosa area, and I picked this friend up in the Redlands area and we went there for this party or gathering.

Q Did you see either Mrs. Miller or Sandy Slagle at the [1134] square dance?

A No, sir, I was not aware of their presence at all.

Q Now, you eventually left the square dance?

A Yes, we did. We left the square dance about 10:00 o'clock. [1135]

Q Now, you went down to the boat. About what time did you arrive at the boat?

A I believe about 11:00, 11:15.

Q And did you take the boat out?

A Yes, sir. We took a harbor cruise and cruised around Lido Island and Balboa Island and then came back to the mooring.

Q How long were you going around the harbor?

A About forty-five minutes to an hour.

Q Were you piloting the boat? [1136]

A I was, sir.

Q And when you came back to the—what do you call the place where you keep the boat?

A The mooring.

Q When you came back to the mooring, is there a sort of a slip into which you pull the boat?

A There is. There is a slip into which you navigate the boat.

Q Ordinarily like when you are leaving the boat, how many lines do you have tying the boat up?

A There are four mooring lines, two forward and two aft, one on the starboard and one on the port, and two on the stern, port and starboard. [1137]

Q When you came back after that tour, in what way did you secure the boat in the slip?

A I maneuvered the boat into the slip and by a boat hook going forward to the bow and the pulpit, leaning over, you can reach and pick up the loop of the bos [sic] lines with the boat hook and then place that onto the chuck. You do not have to get off of the bow to secure those two lines. And I secured those two lines then on the chuck, which had the three or four half inches on the cleats on the dock. The cleats you leave there and you leave the lines there, and when you come back in, you reach over and just with the boat hook put the loop around the chuck. [1138]

Q All right. Then you went in the cabin. What did you do there?

A We went in the cabin, and we have a portable television in the main salon, and my friend fixed some

hot chocolate and we had something to eat and sat on the couch and watched telvision.

Q Were you aware of anyone untying the boat while you were in there?

A No, sir, not at all.

Q How long were you there from the time you came in and secured the bow of the boat until you finally left?

A I would estimate in the area of thirty minutes.

Q When you—after the thirty minutes, when you left the boat, was the boat in the position where you had left it?

A No, sir, it was not.

Q What did you notice when you came out from the cabin? [1139]

A I secured the boat inside by pulling the switches off and then we opened the door, and the moment I opened the door, I noticed that we were out of the slip partially into the bay, and I then immediately went forward and I was able to jump from the bow over to the dock, and by means of my boat hook and a line I was able to pull the boat around into the dock.

Q How far had the bow drifted from its position in which you had tied it?

A Well, in terms of feet, I would estimate probably forty to fifty feet.

Q How long is the boat?

A The boat is forty-two feet.

Q Did you—after you brought it in, by the way, were the lines, the forward lines, the loops still over the chucks on the bow of the boat?

A No, sir, they were not over the—yes, they were over the chucks but they were untied on the dock.

Q So they were just trailing in the water then?

A Trailing in the water.

Q So you pulled the boat back in and did you secure it again?

A I did.

Q All four lines?

A Yes, sir. [1140]

Q All right. You didn't see Mrs. Miller or Miss Slagle around, did you?

A No, I did not see them nor did I hear anyone.

Q Then you went to your car and started returning home?

A Yes, sir.

Q On the way home did you see Mrs. Miller?

A I did.

Q Where was that?

A After we had left the boat, we were driving through Costa Mesa and about five miles before you get onto the freeway there is a—one or two stop signals, and I came to a stop signal and I glanced to my left and to my astonishment I saw Mrs. Miller in a Volkswagen.

Q Was she driving it?

A No, sir. She was in the—slumped down in the seat and had her hand over her face and was peeking through her fingers.

Q Who was driving it?

A Sandy Slagle.

Q All right. Then eventually you got on the freeway?

A Yes, sir.

Q Did you still see this Volkswagen? [1141]

A Yes, sir. It continued to follow me.

Q Did you change your speed?

A Yes. I was concerned that—I didn't know what she was going to do, and I certainly didn't want to have any scene when I took my friend home, and I changed my speed, and when I slowed down, it would slow down, and when I speeded up, it would speed up, and it kept following me all the way to Riverside.

Q What happened when you got to Riverside?

A Well, I frankly wanted to lose her, and so when we got to Riverside, I very quickly jammed on my brakes and made a right-hand turn on an off-ramp and I saw the Volkswagen jam on the brakes, but by the time—well, I didn't see what happened to it because I went on up the off-ramp and went into—went around several blocks and went into a service station to get gas.

Q Then you took your date on home?

A Yes, sir.

Q After you took her home, did you return to your house?

A I drove up the street to my house. [1142]

Q So what did you do?

A Well, I quickly reached over and locked the door and I stopped.

Q Then what happened?

A Mrs. Miller jumped out of the Volkswagen and she came over and grabbed ahold of the handle and tried to open it and started to yell at me.

Q What did she say?

A She said—she used a profane word and she said, 'You so and so, you had better open this door and let me in.'

Q What did you say?

A I said, 'Lucille, please don't yell. Don't wake up the neighbors.'

Q Then what happened?

A Well, she said, 'If you let me in and act civilized, I'll talk to you,' and I reached over and opened the door and she got in.

Q Then what was said?

A Well, I said, 'Lucille, did you—have you been following me all evening?' And she said, 'I have, Sonny Boy, and I know exactly everything that you have done.' And I said, 'Lucille, are you out of your mind? I can't imagine anybody doing something so stupid as that. I can't believe that you really have.' She said, 'Well, if you want to know what you did, I'll tell you,' and she reiterated [1143] everything that I did from the time that I left home and picked up my friend and ate tacos and went into the square dance, and she said that she was—I said, 'Did you stay there during that three hour period?' She said, 'Yes, I did, and we were peeking in the windows and I can tell you everything that you did in there and when you walked out on the balcony.'

Q She said they were peeking through the windows at the square dance?

A Yes, sir.

Q Okay. Go ahead. What else was said?

A I said, 'Lucille, I can't understand this. No normal person would do this. How in the world can you do something like this? It's so silly and stupid.' She said, 'Well, look, I've tried to be nice to you and I've tried to have you be nice to me,' and she said, 'You have been putting me off and you won't let me talk to you and you won't let me see your children or get

ahold of you at home or at the office, and this is the only way that I can talk to you.' And I said, 'Well, I don't want to talk to you, Lucille,' and I said, 'I don't want to see you,' and I said, 'If I ever did before, this certainly ends any thought I ever had.' I said, 'This is the most—the silliest and stupidist thing I could possibly imagine.'

Q In that conversation did she make any mention of your not [1144] being the first one to do something?

A Yes. She became very irritated and I asked, I said, 'Please leave. I want to go—I want to drive in the driveway. Please move your car.' And then she, towards the end she said, 'Look, Arthwell, I want to tell you something.' She said, 'I have never had any man in my life reject me,' and she pointed her finger and she said, 'You are not just about the first one to do it.' And I said, 'Lucille, get out of this car before I throw you out.'

Q Did she get out?

A Yes.

Q And did she drive away?

A Yes, she did.

Q Now, towards the end of June then did there—was there an occasion when you returned home from work and Jeffry wasn't there?

A Yes, there was.

Q And did you inquire as to where Jeffry was?

A Yes, I did. I had no idea where he was.

Q And were you advised that Mrs. Miller had taken him?

A I was.

Q Had she asked your permission to take him?

A She had not.

Q Jeffry was your youngest son?

A Yes, sir.

Q He is seven? [1145].

A Right.

Q Did you know where she had taken him?

A No, I did not at that time. I tried to find out because we had enrolled Jeffry in a summer bible school and he was just starting and I was very upset that he wasn't continuing to go there. And then I asked my daughter Terry and she told me that Mrs. Miller—she called her Auntie Lucille—had come over and picked up Jeffry and was going to take him to the mountains for a week.

Q This was news to you?

A I did not know a thing about it.

Q How long was Jeffry gone?

A About a week.

Q Did you find out later where he had been?

A Yes, I did.

Q Where?

A Well, she told me that he—she or—well, I mean —

Q Did Mrs. Miller tell you where she had had Jeffry?

A No, I don't believe that I saw her, but my daughter had told me that Mrs. Miller was taking Jeffry up to the mountains and I understood that it was up at Harold Lance's cabin. [1146]

Q Now going back to the latter part of July, about July 29th, did you receive a phone call from Mrs. Miller?

A I did, sir.

Q Where did you receive that phone call?

A I was at home in my home in Redlands.

Q About what time did you receive the first call?

A I received the first call about 9:00 o'clock, as I recall.

Q In the evening?

A It was in the evening.

Q What did she say?

A She said, 'Hello, Arthwell.' She said, 'I want to tell you how sorry I am for some of the foolish things that I did, and I know how upset you were about me going down to the boat and I know it was kind of silly and I'm awfully sorry. I wanted to try to see you and talk to you but Eleanor won't let me through and Wenche won't let me through and I can't get to you, and the only way I can try to get any information is through Erwin.' [1147]

Q That is Erwin Sprengel?

A Erwin Sprengel. 'And he won't let me get in touch with you, and I just want to be nice to you and I want you to be nice to me and I would very much like to have you come on over to my home this evening.'

Q Okay. And tell the rest of the conversation.

A I said, 'Lucille, I have made it very plain to you that I do not want to see you or communicate with you. Any normal person would understand what I have tried to tell you. And I don't want to be rude to you but I have made my thoughts plain to you and I have done everything that I know humanly possible to keep you away from me and my family and my home, and I'm not coming over to your house tonight or any other night,' and I hung up the phone.

Q Did you receive any more calls that night?

A I did, sir.

Q How long after you hung up the first one?

A About ten or fifteen minutes.

Q Who was that from?

A It was from Mrs. Miller.

Q What did she say?

A Her voice was different and she said in substance, 'Look, Arthwell, if you are not coming over to see me tonight, I'm going to come over to see you and I'm going to see you whether you want to see me or not.' And I made no answer and I hung up the phone. [1148].

Q Did you receive any more calls that evening?

A Yes, I did.

Q How long after you had hung up that one time?

A Well, I was in bed by that time and I think it was about fifteen or twenty minutes after that.

Q Who was on the phone?

A It was Mrs. Miller again.

Q What did she say?

A The first thing she said was, 'Arthwell, you had better not hang up this phone if you know what's good for you.' She said, 'I want to talk to you and you are going to listen to me.' She said, 'I tried to be nice. I tried to do everything for your children and to be nice to you.' And she said, 'Now you are not just about going to act this way to me.' She said, 'You had better not hang up this phone because I have got a few things to tell you.' She said, 'If you are not going to come over to see me,' She said, 'I'm going to see you tonight no matter where it is.' She said, 'If you don't want me to come over to your house,' she said, 'I'll meet you any place that you say.' And I said, 'Lucille, I'm not going to meet you at your house or any house or any other place. She said, 'Arthwell,' she said, 'I'll tell you exactly

what I'm going to do if you don't let me.' She said, 'First I'm going to go to that dear pastor of yours and tell him a few things; that when I do tell him that, you won't be [1149] in the Redlands church any more.' She said, 'Secondly, I'm going to go to all your friends in Redlands,' and she said, 'All of these hypocrites over there, I'm going to tell them about you,' and she said, 'By that time you won't have any friends in Redlands.' She said, 'Then I'm going to go to Loma Linda, I'm going to tell them in Loma Linda.' She said, 'You won't have any friends in Loma Linda. Then I'm going to go to your friends in San Bernardino at the court house,' and she said, 'If you were ever a lawyer before, your reputation will be ruined by the time I'm through.' And I said, 'Lucille, I'm just out of my mind.' I said, 'I don't understand what in the world is —you can say these things.' I said, 'I don't want to cause any trouble but,' I said, 'You have made these statements to me,' and I said, 'I'll go to Sheriff Frank Bland and tell him some things that I know about you and you'll wish you had never heard of Arthwell Hayton.' And she said, 'Look, Sonny Boy,' she said, 'If you think your reputation is going to be ruined, your life won't be worth two cents.' And I said, 'Lucille, I'm not going to listen to any more of that,' and I hung up the phone.

Q Did the phone ring again?

A. Yes, it did. [1150]

Q Do you recall about how long that was after the conclusion of the third call?

A It was very shortly. Within minutes after the third call.

Q And you answered the phone?

A Well, I debated, and it kept ringing, and I didn't want it to wake up the children and I did.

Q And who was on the phone that time?

A Sandy Slagel.

Q Did she tell whether or not Mrs. Miller was with her?

"MR. FOLEY: Just a moment.

A She told me that she was in the same room with Mrs. Miller. [1156]

Q (By Mr. Turner) What was said, sir?

A Sandy said to me, 'Arthwell, I am here with Lucille, and she is beside herself, and if you know, really, what is good for you and the children, you will see her tonight.' And I said, 'Sandy, I have told her and I have told you that I will not see her or her children now or at any time,' and she said, 'Arthwell, you have no realization or comprehension of what this woman is capable of doing, and for your own safety, you should [1157] see her tonight,' and I said, 'I will not,' and I hung up the phone. [1158]

Q Where did you go?

A I went to New York.

Q How long did you stay in New York?

A My two children and I stayed in New York and Washington for approximately two weeks. Between two and three weeks. Till about the middle of August.

Q Before you left, did you make any arrangements about your telephone at home?

A Yes, sir; I made arrangements to have my telephone disconnected. That is, I left instructions with Mr. Sprengel to have it disconnected.

Q When you returned, had it been disconnected?

A It had been disconnected, for about a week and then, a new unlisted number had been installed.

Q Now, after, between two and three weeks, did you return to your home?

A Yes, I did.

Q Then, what did you do?

A I, the latter part of August, went on a vacation with the family. The children and I spent time at the beach area and also on our boat at Catalina, and we were vacationing.

Q When did you return to the office?

A I returned to the office about the first week in [1160] September.

Q Now, also sometime during the first week in September, after you had returned home to the office, did you take your daughter up north?

A Yes, sir. I had made arrangements to have my daughter go to a parochial Seventh Day Adventist Academy, a boarding academy in the northern part of the State, at Rio Linda and I was planning on taking her and I did take her there.

Q On the way, did you stop at Mrs. Miller's house?

A Yes, sir; I did.

Q How did that come about?

A A day before, Mrs. Miller had come over to see Terry at my home and Wenche had called me and I told her to take the children out of the house and keep them or hide them with neighbors, and when I came home, and the—or the next day when we left, Terry brought that up, my little girl Terry, and she said, 'Daddy, I know that you have told me not to talk with Mrs. Miller or Auntie Lucille,' as she called her, 'But I feel so bad about not seeing Debbie before I leave. Couldn't we please stop by and just let me say goodbye to Debbie?'

Q So, on the basis of that, did you stop by?

A Yes, we did.

Q Did you go in the house? [1161]

A No, I did not.

Q You stayed in the car?

A I told Terry, I said, 'Terry, I do not want to go in the house. I want you just to go in and see Debbie. Say Goodbye to her and please do not stay more than a minute or two.'

Q Okay. Did you see Mrs. Miller?

A Mrs. Miller came out of the house.

Q And is that the last time that you saw her?

A That is the last time I have ever seen Mrs. Miller.

Q Until the trial?

A Until today. [1162]

Q And did you terminate your business relationship with Mrs. Miller at that time?

A Well, I had previously told Mrs. Miller by telephone conversation that I did not want to handle her case, and suggested that, this was after the boat incident, that she get some other attorney.

Nothing had happened and so the day after these telephone calls, I told Eleanor to dictate a letter immediately telling Mrs. Miller that I did not want to in any way represent her further in connection with this legal matter. [1166]

Q Now, between November of 1963, the end of November 1963 and June 1, 1964, and saw Lucille Miller on many occasions, didn't you?

A Yes, sir.

Q You have been out riding together alone in your automobile, haven't you?

A Yes, sir.

Q And this red convertible that you have, it is a Cadillac, isn't it?

A Yes, sir.

Q You have been to Palm Springs with her in that Cadillac, Mr. Hayton?

A Yes, sir.

Q And have you registered in motels with her, Mr. Hayton?

A Yes, sir.

Q And when you have registered with her in motels, Mr. Hayton, you used a different name, didn't you?

A Yes, sir.

Q One of the names that you used was Jack Wardruff, wasn't it? [1181]

Q (By Mr. Foley) And on June 22nd, 1964, you registered with her under the name of Jack Wardruff at the Caravan Motel in Riverside, didn't you?

A No, sir.

Q Did you ever register at the Caravan Motel in Riverside?

A Not—I do not believe so, sir.

Q When you used the name Jack Wardruff, did you use an address on 14th Street in Barstow, California?

A I really don't remember what address I used.

Q How many times did you register at motels with Mrs. Miller, Mr. Hayton?

A On two or three occasions.

Q Do you recall the date of the last time you registered at a motel with Mrs. Miller?

A No, I do not recall.

Q Do you recall what month it was, Mr. Hayton?

A Well, it was—I believe it was in June.

Q It was on June 22nd, wasn't it, Mr. Hayton?

A The date I do not recall, sir.

Q You know where the Caravan Motel is, don't you, Mr. Hayton?

A I do not know it by that name, no.

Q Do you know the Caravan Motel under another name?

A Well, I don't know. I registered with Mrs. Miller, sir but I don't remember the name of the motel. [1182]

Q Well, let's go back to the start. There came a time, sometime after November of 1963, when you and Lucille first went to a motel, isn't that right?

A Yes, sir.

Q All right. And now, that didn't happen overnight, did it? It took time to develop that relationship, didn't it?

A Not on my part, sir.

Q You were enticed to go to that motel by her?

A I was asked to go there by her.

Q All right. You didn't ask her to go?

A Well, I was asked to spend—I was asked to spend the evening with her. [1190]

Q Now, is your law firm handling the estate of Dr. Gordon Eugene Miller?

A Yes, it is.

Q I have asked you to bring with you the evidence of insurance on the life of Dr. Miller as it was existing at the time of his death, and have you brought that, sir?

A Yes, sir.

Q Specifically, sir, do you have in your file a policy issued by Connecticut Mutual Life Insurance Company, No. 1645159 in the amount of $20,000?

A Yes, sir.

Q Is that a double indemnity policy?

A Yes, sir.

Q What does double indemnity mean?

A It means that in the event of accidental death, it pays twice the face amount of the policy?

Q $40,000, then?

A Yes, sir.

Q Have you got the original and a copy of that policy?

A Yes, I do.

Q You prepared the copy, did you, or did you have it prepared?

A Yes, it was prepared in my office.

Q And this is a correct copy of the original?

A As far as I know.

Q Do you also have in your file a policy issued by Prudential [1194] Insurance Company of America in the amount of $50,000 on the life of Gordon Eugene Miller?

A Yes, I do.

Q Is that a double indemnity policy?

A No, it is not.

Q Who is the beneficiary?

A I believe Lucille Marie Miller and the children that exist by virtue of that marriage.

Q Was Lucille the primary beneficiary?

A Yes. I am not just certain whether she is the primary beneficiary or there were co-beneficiaries or not.

My notes from reviewing the insurance policy at the time I checked it indicate Lucille as beneficiary and the children equally. Now—

Q Do you have a photostatic copy of that policy, sir?

A Yes, sir; I do.

Q And this photostatic copy is a correct copy of the original?

A I believe so.

Q Referring back to the Connecticut Mutual policy you mentioned previously, the $20,000 double indemnity. Was Lucille Miller the primary beneficiary of that policy?

A Yes. The children were alternates.

Q Do you have a policy issued by Northwestern National Life, No. GC 3364-1117? [1195]

A I do not have the original of that policy. However, I have a photostatic copy of it.

Q Is that in the amount of $10,000 double indemnity?

A I believe so.

Q And is Lucille Miller the primary beneficiary?

A Yes.

Q You say you have a copy of that, sir?

A Yes.

Q And do you have a policy issued by Aetna Casualty and Surety No. 33FA163122 insuring the life of Gordon Eugene Miller for $10,000?

"MR. FOLEY: Pardon me. How much, Counsel?

"MR. TURNER: $10,000.

"THE WITNESS: That is not a life insurance policy. There is an accidental death provision within the automobile insurance and it applies to anyone who might be an insured within the meaning of that automobile insurance policy, and is not a life insurance policy, as such, but I do have that.

Q (By Mr. Turner) And would that pay the sum of $10,000 to anyone killed in an accident in the automobile?

A It pays $10,000 to the spouse residing in the same household.

Q And did that policy insure the life of Gordon Eugene Miller in that manner?

A Yes, I believe it did. [1196]

Q Was there also a funeral expense benefit in that policy?

A Yes. There is a $1,000 funeral or medical expense.

Q Now, in connection with this dental association, did you have a policy issued by the National Casualty Company of Detroit No. 511200?

A Yes.

Q Paying $1,000 upon the accidental death of Gordon Eugene Miller?

A Yes.

Q And was Lucille Miller the primary beneficiary?

A I think it is described in the policy as a spouse residing in the same household as the definition of the beneficiary.

Q By the same company, Policy X1011495 insuring in the amount of $1,000 Gordon Eugene Miller against accidental death?

A Yes.

Q Are those both through the dental association?

A Yes.

Q Do you have copies of those two?

A I believe so.

Q Is this both of them?

A No, that's one.

Q I believe I neglected to get from you a copy of the Aetna Casualty $10,000?

A The one on the automobile? [1197]

Q Yes, sir. Thank you, sir.

In addition to those policies, was there a policy issued by Scarborough and Company covering the chattel mortgage on the Ford Mustang?

A I have no personal knowledge that there was except from what the executor has advised me.

Q You are not the executor, sir?

A No. The First National Bank and Trust Company of Ontario is the executor. We are the attorneys that represent the executor.

Q I see. Have you learned that the indebtedness in the amount of $3,577.37 on the Mustang was paid by an insurance company?

A I believe it was, yes.

Q You have no copy of any policy on that one, do you?

A No, I don't. I merely have the photostatic copy of the promissory note and chattel mortgage indicating it is paid and with a notation: 'Credit life insurance loan.'

"MR. FOLEY: I will stipulate that it has been paid, if you wish, Counsel.

"MR. TURNER: Thank you, sir.

I offer the policies which are photostatic copies of the originals, if Counsel has no objection to the fact that they are photo copies. I offer them in evidence, your Honor, as People's next in order. [1198]

Q Do you recall the day that you took her to Palm Springs in March of 1964?

A I don't recall the particular day, Mr. Foley. I recall that we went down there.

Q You went to the spa?

A Yes, sir.

Q And you and Lucille—strike that. You and Lucille obtained a room at the spa, didn't you, that day?

A Yes, we did.

Q And you were intimate with her in that room that day, were you?

A Yes, sir.

Q And then you had dinner with her after that?

A Yes, we did.

Q And didn't you ask her at that meal—didn't you bring up the subject of marrying her at that meal?

A I never brought up the subject of marrying Mrs. Miller at that meal or any other meal. [1207]

Q Did she say to you, 'Don't you have the guts to tell me in person'?

A I think that she told me that 'Why don't you have the guts to either see me or tell me in person rather than tell me over the phone.'

Q Did you meet her in Harold's Club in Fontana and discuss that telephone conversation with her?

A I met her at Harold's Club. I do not know—we had lunch there. But if I recall, that was before the minister talked to me.

Q I'm not talking about having lunch, Mr. Hayton. I'm talking about meeting Lucille at Harold's Club and discussing this telephone conversation with the minister.

A Well, as I say, Mr. Foley, I remember having lunch with Mrs. Miller at Harold's Club and having a discussion with her at that time reiterating that I did not want to see her any further. Now, whether that was—or when that was in connection with when the minister talked to me, I really don't know, but I believe it was afterward. [1210]

A No, sir, we did not go to lunch at Skinner's.

Q You never went to lunch at Skinner's with Darlene and Lucille?

A No, we did not go to lunch at Skinner's. We went to dinner that evening with Mr. and Mrs. Sprengel, but I do not believe that we went to lunch.

Q That evening, the same evening that you met her, you went to dinner at Pitruzzello's, didn't you, in Riverside?

A There were five of us, yes, sir.

Q The five of you being you and Lucille and the Sprengels and Darlene Nemner?

A That's correct.

Q And that was on June 22, 1964, wasn't it?

A Yes, sir.

Q And after you had dinner, you and Lucille went to the Caravan Inn that night, didn't you?

A Well, it was—again you mentioned the name of the place, sir, and I don't remember, but we did go out that evening.

Q And that was about three weeks after the minister had talked to you, wasn't it?

A Yes, I believe that's correct.

Q Now, isn't it a fact that that night, Mr. Hayton, you gave Lucille permission to take Jeffry to the mountains the following day? [1215]

Q What date did this boat incident occur, Mr. Hayton?

A Well, again the exact date I'm not certain, but the best of my recollection, it was sometime in the early part of July. [1217]

Q About when was that?

A I believe that was in November.

Q Of 1963?

A Yes, sir.

Q And do you recall what motel that was you went to?

A Well, she asked me to come over to her home and from there we talked about where we would go, and I believe we want to Arcadia.

Q You went to a motel in Arcadia, you believe?

A Yes, sir. [1224]

Q You did want to marry Mr. Hayton, didn't you?

A At one time, yes.

Q When did you stop wanting to marry him? [1782]

A After the night that Sandy and I followed him to the boat.

Q Mr. Hayton phoned you on or about May 24th and told you that Rev. Hassenphlugg had told him there was a lot of gossip going around, didn't he?

A Yes.

Q And at that time I take it you still wanted to marry Mr. Hayton?

A Yes, I still felt then that I was in love with him. [1783]

Q When did your affair with Mr. Hayton start?

A The first part of December a year ago.

Q 1963?

A 1963.

Q You had known him, however, for some years before that?

A Yes.

Q At the time your affair with Mr. Hayton started and before it had actually started, were you consulting with Mr. Hayton concerning your desire to divorce your husband?

A No— [1784]

Q Mrs. Miller, during this period when you were going with Mr. Hayton, did you want to be unmarried to Dr. Miller?

A Toward the end, yes.

Q For how long have you wanted to be unmarried to Dr. Miller?

A Mr. Turner, our marriage was like everyone else's. It had its ups and downs, and there were times when things didn't go and times when they went well. I couldn't give you the specific answers on that.

Q You had been wanting to be unmarried to Dr. Miller for years, hadn't you? [1786]

A We had had our problems and there were times when I did feel that way, as I said before, and other times when I wouldn't have left him for anything, so it was both up and down. [1787]

Q (By Mr. Turner) Mrs. Miller, is it true that you lost interest in Mr. Hayton at the time of the boat incident, or after the boat incident?

A Wasn't your question, if I lost interest in marrying him?

Q All right. Did you lose interest in marrying him at the time of the boat incident?

A Yes.

Q Did you continue to feel that you were in love with him after that?

A Yes.

Q Are you still?

A No.

Q When did you stop feeling that you were in love with him?

A The minute that Cork was gone.

Q Up until the time Cork died you still felt then that you were in love with Mr. Hayton?

A Yes. [1788]

A I can't answer you because I don't know.

Q And PAC is sort of like Anacin, isn't it, a pain reliever?

A Repeat the question, please.

Q The PAC, that is something like Anacin, a pain reliever like Anacin, not the cyclopal, but the PAC?

A If you are referring to PAC, yes.

Q All right. And cyclopal, however, is a barbituate, [sic] isn't it?

A I can't answer. I have tried to look it up and I couldn't find the answer.

Q So, actually, Mrs. McIntosh, you, yourself don't know very much about drugs, do you?

A Oh, all I know is what I have had experience with.

Q Well, you have had experience with cyclopal?

A Yes.

Q And you don't know whether or not that is a barbiturate, is that right?

A The only way I can answer that is I know we had it in the office. I know what I was told it was to be used for and to give it to patients. That is the extent of my knowledge. [1952]

"Stop and think back why you married your wife or you married your husband. Probably a lot of reasons. You stop and start to analyze the reasons why a couple get married, there are a lot of reasons. Usually pretty wonderful reasons, but there are a lot of them, not just one thing. Same way with killing.

"It is hard to imagine anyone would kill somebody, and yet we know as human beings they do, and why, probably a multitude of things.

"The evidence shows that Mrs. Miller and Dr. Miller were married approximately 15 years ago, and as she said, she had been rejected for 14 of those 15 years. She said she did not love her husband. She said in fact that she loved someone else. I wonder why.

"You know, when you are talking about murder, you have got to try to see what makes people tick just a little bit. I don't know if we ever really know what makes people do what they do, what makes them tick, but you have got to try to understand them a little bit.

"Well, what sort of a person was Dr. Miller? You have had some indications in this trial. I think everyone who testified about him seemed to indicate that they liked him, he was a pretty good guy, good man, respected. That's what Mrs. Miller told the girl up in jail, she didn't love him but she respected him.

"He was a nice looking fellow, intelligent, [2016] loved only Mrs. Miller and Mrs. Miller wanted from everyone around her everything she could get from everyone around her. She wanted fun. She wanted company. She wanted talk. She wanted money. She wanted social status, prestige, things of this sort. She wanted to live in as fancy a house as the rest of them lived in, to be able to travel along with the wealthiest in her group.

"One gets the impression listening to some of the things that went on in the tape recording that Mr. Sprengel made of her conversation to him on July 31st, for instance, that she was a manipulator, a user of people for her own advantages.

"How about Mr. Hayton? She testified that she loved Hayton; that she had wanted to marry him. She testified that her love for him died the same time her husband died. I'm not sure what that would have to do with it. At any rate, that's her testimony. But that's not what she told the girl up in jail. She told the girl up in jail that she still loved Hayton, felt that he would come to her. She still had in her wallet Hayton's business card and the little souvenir placecard from the party the year before. She concedes that she wanted Hayton right up to the time of her husband's death, and, of course, she was arrested immediately thereafter, so there wasn't much opportunity to do much about that after that.

"But why did she love Hayton? Why did she want to [2019] marry Hayton? Was it because of a great womanly love for this fine man or was it for what she thought this man could do for her?

"Remember at the time this started she's married to Dr. Miller, she has got three kids, Mr. Hayton is married to a very fine woman, they have four kids.

"She saw in Mr. Hayton a successful attorney, a good attorney, a moneymaking attorney, a young man on the way up, already doing fine and with tremendous prospects for doing better, a man who was active socially. He wasn't just a member of the church and active in that sense, he was organizationally-speaking active. I believe there was some comment about his being active politically, things of this sort. This is what she wanted. It was what Mr. Hayton could do for her, not what she could do for him that interested her.

"A manipulator of people. What did she do in that regard? She was one of Mrs. Hayton's best friends,

a frequenter of the home. All the time she's going to the motel she told you about, she's sympathizing with Mrs. Hayton trying to help Mrs. Hayton work out her problems and undoubtedly trying to encourage her to throw that terrible Hayton over and get a divorce so that she could marry him.

"Talk about your duplicity. In that conversation with Mr. Sprengel that was tape recorded, that was about 45 minutes, and you listen to that tape from beginning to [2020] end and what is it actually from beginning to end? She starts out, 'You want to hear a letter I got today?" And she talks about this letter she got from Hayton where Hayton says, 'Take your business elsewhere,' and the whole conversation really is, 'If I could just talk to him, if I could just get back together with him; he's just afraid to talk to me, he's afraid that he'll give in if he talks to me.'

"Remember this was on the 31st, the day after she had had those night telephone calls, she and Sandy, where she called him at his home and at first was real sweet and nice, she had to see him, and ended up threatening him if he didn't see her that night, she was going to do all sorts of terrible things, and the next thing is when Hayton speeded up his trip to New York and got his kids out of town, was gone for the whole month of August. [2021]

"Now, she indicated that she did not love her husband; that she had been rejected by him for some 14 years. She indicated a love affair with Mr. Hayton. Behind that we cannot go and we must not consider, but at least [2023] she—Mr. Hayton testified that Hayton started getting chummy with her; he had known her for years, had been close friends of the family's,

started getting personally friendly with her when she called him over to the house to discuss divorce as an attorney friend; that's what led to their getting together privately. So you see Hayton wasn't the cause of their not getting along. Hayton was just another symptom of her wanting to get something better than her husband, get somebody who could do more for her than her husband.

"This Hayton affair and the manner in which she handled it is rather interesting as indicative of the mental atmosphere of this woman that would lead her to a thing like murder.

"She started talking to Hayton because she wanted to divorce her husband, some talk, he said, about the financial problems involved in divorce, 'How much alimony can I get?" Things of this sort. They went to motels, according to her testimony—incidentally, this is all stuff put on by the defense about the intimacy between these two—one thing led to another, but it is pretty clear what she wanted. She wanted to be Hayton's wife right from the start. She wanted a divorce from her husband, be rid of her husband so she could have a better situation. [2024]

The more she saw Hayton, the more she's around him, the more she realizes that this is the type of man that she would like to be tied to. 'Here is the type of man that socially and financially and every way can take me closer to where I want to go than can Dr. Miller.'

"We get up to the point, though, where apparently she has been a very close friend of Mrs. Hayton but Mrs. Hayton apparently isn't divorcing Mr. Hayton. She has a meeting with Mr. Hayton around the 20th

of April, I believe, 1964, luncheon meeting. She calls him and says, 'Let's get together for lunch.' They do down here at the Holiday Inn, I believe she said or he said, and at that luncheon she again brought up the question, 'Look, now, let's be realistic. Mrs. Hayton isn't the one for you. I am. You know you'll never be happy with Mrs. Hayton.' This incident is uncontradicted. Hayton told you what was said but she took the stand and didn't deny one word. She told Mr. Hayton, 'Look, I'm going to divorce Cork. I've made up my mind I'm going to divorce Cork. You divorce your wife and we can get married.' And Hayton indicated that he [2025] would not.

"I hope you understand in the course of this trial we are not here to either excuse or blame Mr. Hayton for his conduct. Obviously a married man should not be running around with another woman whether or not the other woman is married. That's not our purpose. We are here to determine whether Mrs. Miller killed her husband. But in order to understand this, you have to know a little bit about what goes on in her mind.

"Hayton tells her—this is uncontradicted—'Look, under no circumstances do I intend to divorce my wife.' He told her, 'I love my wife. I'm satisfied with my wife. She's a good mother for the children. We have had many years of marriage and I don't intend to bust it up and I don't intend to divorce her.' And he told about the conversation, got a little hot but it ended up that way, that he was not going to leave his wife.

"The testimony is that the following Friday, that while Mr. Hayton and his boy and some other boys were over at Catalina, that Mrs. Hayton died and that Mr. Hayton returned when he was notified by the

Coast Guard, Red Cross or somebody, he returned and Mrs. Miller met him at the airport, Tri-City Airport, and Mr. Hayton told about how very helpful Mrs. Miller was. She immediately—well, she was with him for some time that day consoling him in his loss, then took some of the children home with her, [2026] then she alternated, running back and forth between the two houses swapping kids, taking care of his place and the kids. When the funeral came along, she brought the kids and they were all at the funeral. She was about as indispensable as you can get. For Mr. Hayton's sake or for Mrs. Miller's sake?

"I think it's pretty clear from everything that happens all the way through here you have got a manipulator in Mrs. Miller, a user. She knows that Hayton is upset and distraught at this time. She knows that he is at least fond of her if not loving her. If he is to marry her, this is a good time to work on him.

"They are together so much that in about a month, along around the end of May, I believe, the minister from the Seventh Day Adventists Church calls Mr. Hayton and asks if he can come and talk to him. 'Sure, come on over' He comes over and he tells Hayton, 'Look, there is some pretty nasty gossip going around the community about you and Mrs. Miller. Now, I don't know if there is anything to it but at least I want to alert you to the fact so that you can avoid doing anything which would tend to feed these rumors.' A polite way of saying, you know, knock it off. So Mr. Hayton, concerned with these rumors—after all, he has children, including a fourteen or fifteen year old girl—fifteen year old boy and a thirteen, fourteen year old girl, old enough to know what's going on, so Mr. Hay-

ton said that [2027] Hayton's business. It probably would have been smarter to say, 'No; get another lawyer.' But this looked like possibly a good case.

"He said, 'Look, I'll send my investigator out to look into it. If it's a good case, I'll take care of it.'

"He did send his investigator out. His investigator came back and gave Hayton the information that it looked like it would be a good case, then Hayton went out to her home. By this time she had returned from the hospital. She is banged up. And there are several other people in the house.

"Hayton took his boy with him when he went over there so there would be no gossip. He went over and in the house he talked to Mrs. Miller. He said they talked about the accident but also she again asked him 'Look, things have died down a little bit now. Can't we see each other again?' And he told her—remember this is all uncontradicted. He told her, 'No; strictly business from now on out. No more of this stuff.'

"Okay. So she bided her time. There may have been one or two other contacts. I don't recall. He indicated there were two or three along in here in which she indicated, 'Let's get together,' and he said, 'Nothing doing.'

"Then on June 22nd he indicated that she called [2029] and arranged for a luncheon meeting with I believe Mr. and Mrs. Sprengel and Mrs. Miller and some other person. They were going to have lunch with Mr. Hayton, lunch or dinner. I forget which. Dinner, I guess. And they did.

"And I'm not exactly sure how it worked out but she ended up and she is there with Hayton to take her home and they drove around quite a while and Mr.

Hayton admitted that they ended up in the motel in Riverside.

"This gives a little credence to what Mrs. Miller told Mr. Sprengel in that recorded phone conversation about 'He's afraid to see me for fear he'll weaken' and also indicates how Mrs. Miller was using sex to try to get to keep Mr. Hayton and ultimately marry him.

"So she admitted on the stand she still wanted to marry him at that time. She said she wanted to marry him up until the time of the boat incident.

"It was right after that apparently that the boat incident occurred, apparently right after that that the boat incident occurred.

"You begin to get a little insight as you go through these various things in Mrs. Miller's thinking and realize that this woman is capable of anything.

"This is what she told Mr. Hayton on July 30th when she telephoned him at his home, she'd ruin him. and she meant it.

"And remember Sandy Slagle called back and said, [2030]

place and went back to his house, and when he got there, there is Mrs. Miller waiting in front.

"Remember Hayton said that he locked the doors hoping that she wouldn't get in the car, figuring she wouldn't climb in, and she came over to the door and tried the door, and he said she used some profanity. He didn't say what it was. 'You so-and-so, you'd better open this door. I want to talk to you.'

"He told her, 'Shhh, I have neighbors.'

"It's 2:00 or 3:00 o'clock in the morning by this time, so to keep from really having a scene out there, he opened the door and she got in.

"And you remember how she read him out and she told him, 'Look here, sonny boy,' words to the effect, 'No man yet has ever turned me down or said no to me,' something to this effect, 'and you are not about to be the first.'

"Hayton said he told her, 'Are you out of your mind? What kind of action is this? What kind of talk is this? Get out before I throw you out.'

"And they sparked at each other for a little while there and she got out and left and he went on in the house.

"None of that is denied and this has been testified to under oath. The only part that's denied, really, is Sandy, who didn't get out of the Volkswagen, and Sandy's testimony is interesting in a lot of respects, but Sandy [2033] she tried to call Sprengel. On that day he then went—I believe it was that day at the office that he told his secretary to write a letter to Mrs. Miller telling her that he would no longer represent her on this automobile accident and suggesting that she take her case to another attorney at once, and the secretary indicated that she wrote that letter. I believe it's in evidence. I believe Mrs. Miller brought it in. It's in evidence.

"Then the next day Mrs. Miller called Sprengel and eventually Sprengel called her back and she talked to him, and that's the tape-recorded one. The tape-recorded one is in evidence, and also a transcription of it is in evidence, so in case you need to read it in the jury room, you can.

"And that's an interesting conversation because she is trying so carefully—she knows that Sprengel is a partner of Hayton's and sees him all the time, and

she is trying so carefully to maneuver through Sprengel to get Hayton to come and talk to her.

'I don't want to in effect make love any more. I've reconciled with my husband. I'm back with my husband. I just want to be friends.'

"But for 45 minutes she is talking about how essential it is that she get to talk to this man, that she get to be friends with him. She mentions the fact that he is afraid that he'll weaken if he sees her again, [2038] and she was pretty sure that he would if she could see him again. [2039]

"What did she testified to? And her testimony was very carefully limited to this and efforts to go beyond it were stopped.

"Her testimony was just to this one time she is there at the house and she sees them all seated together. This is the memory she's carrying of her son. And she testified to Dr. Miller's telling her that Mrs. Miller felt if they had another child, it might bring them closer together. This was at a time when, according to Mrs. Miller's testimony, she is in love with Hayton and not loving her husband. [2040]

situation. You remember the night of the boat incident she really raised cain with him and he indicated, Mr. Hayton indicated that that did it as far as he was concerned. It becomes apparent from this point on that he is literally afraid of her.

"On the night of the 30th of July, she calls him at home with a lot of threats and she gets no place. She demands to see him or else she's going to ruin him, and for a man who is as prominent in the community and legal profession and his church as Hayton

was, and who has this clandestine love affair going on, this is quite a threat.

"But Hayton would have nothing to do with her. He's afraid of her at this point. And the next day then, since she was not able to get through to Hayton to get to talk to him to try to talk him ino something, what does she do? She talks to his business partner.

"If you want to get word to a man you can't talk to, you talk to somebody that you know darn well is going to tell him what you said.

"She spends about 45 minutes talking to him, and let's see some of the things she says along the blackmail line.

"She tells Sprengel about the tape recording that she supposedly made back in February or March, a long time before any trouble developed between them, and let's see what she says about that. She is talking to Sprengel on [2058] the phone.

"She says, 'One time about March, the end of February or March—I just—I don't know—I just was real suspicious of the whole thing and I thought I noticed Art had two sides to him—' And get this, now—'and if he ever decided to be a bastard and turn on me and say, "I never said anything," you know, and try to get out of it—' Get out of what? She's a married woman. He's a married man. Way back then obviously she's working her web around for the purpose of ultimately either willingly or forcibly marrying this guy.

"'If he ever tried to get out of it. So I have a friend who runs a very big photography place, you know, tapes and everything—' And she tells then about putting the tape recorder under the seat in the

Cadillac and picking up this long conversation which she more or less relates, and she ends up by saying, 'I just thought just in case, you know, he ever pulls this—' This is back in February or March, and she is saying this to his partner, obviously realizing that it will be repeated to Hayton. She wants to talk to Hayton. The night before she tried to force him to talk to her and he wouldn't do it. Now, through his partner, she is indicating again, 'Either talk to me or I'm going to ruin you.'

"What else along the same line? In the same phone conversation I believe she mentions having motel [2059] receipts from when they had gone out.

"It's kind of hard for me to imagine a woman, married woman going out with a married man to motels and saving motel receipts to use against him unless you have in mind that you are going to get this guy one way or the other, for blackmail purposes.

"She tells Sprengel, 'I've got him coming and going.' Now, that's sort of a threat, then cajoling, she says, 'If he would just talk to me.' Then she says, 'I could get that little boy coming and going and he hasn't got a thing on me he can prove.' Threatening again.

"She really seems to think that rather than suffer the exposure and embarrassment and to some extent disgrace that this would and has brought upon him, that he would marry her.

"Then she goes on and she threatens him a little indirectly by talking about Cork, and she makes it clear that Cork has known about this Hayton love affair for a long time. She mentions the fact that she showed this letter she got from Hayton calling off the business arrangement to Cork and Cork indicated, 'Good, I'm

glad it's ending that way,' and she goes on to say that Cork had said that if he wasn't a Christian, he would kill Hayton, obviously indicating that Cork had been told about the Hayton affair. Obviously she had been throwing that in his face. [2060]

"I guess Sprengel indicated he didn't think Cork would really kill him. She's indicating, 'No, but he would go over there and beat him up, take him apart.'

"She says, 'I've spent an awful lot of time keeping Cork under control and did a beautiful job on it, but I'm not going to work too hard at it any more.'

"Again we have a manipulator, somebody who is using one person against the other.

"Now, Sprengel is Hayton's business partner. She cultivated Sprengel. Mrs. Sprengel didn't really get to know her until about spring of 1964. So she cultivated Mrs. Sprengel, and, now, the 30th of July, she makes the last effort directly with Hayton by calling him at home at night to get to talk to him and Hayton cuts her off.

"The next day she has this long conversation with Mr. Sprengel and the next day Hayton leaves town. He's gone two weeks to New York, then he's back and he's out of town in Southern California vacationing for another couple of weeks.

"Mrs. Sprengel testified that in late August—this is after Hayton is back from the East but not staying at home—Mrs. Miller telephoned Mrs. Sprengel and indicated that she was still holding a trump card against Hayton.

"Now, she says that she lost all interest in marrying Hayton as of the night of the boat incident, [2061] although she admits that she continues to love him up until the time of her arrest, up until her husband's

death, which is about the same, and yet in late August she is saying she is still holding the trump card against Hayton, and the only reason of holding a trump card is a blackmail threat that 'Either you marry me or else,' and she told Mrs. Sprengel in that conversation yes, she still loved Hayton.

"She's a woman and she's got to save face a little bit.

"In that conversation, that same conversation she says, 'Of course I wouldn't marry him any more but I still love him.' But she's passing the word hoping that it will get to Hayton and hoping that Hayton will see the light and come around.

"On September 22nd, in Mrs. Sprengel's home, Mrs. Miller phones first, says, 'I want to come over and show you a letter,' she then comes over to the house and that's when she shows a letter which is apparently supposed to affect Mr. Hayton, and she indicates that she—she admits this isn't the original letter. She is supposed to have copied the original letter.

"But she says that she was planning to have photo copies made of this letter and distribute them to the right people around the county, including Mr. Hayton.

"Again a blackmail threat. [2062]

"Then, of course, when you are blackmailing, you have to have something that you are trying to get them to do, and if you don't, then you'll do these terrible things to them.

"What she says to Mrs. Sprengel, then, she says, 'Of course, if I had married Mr. Hayton, I would have destroyed this letter.' She hasn't distributed it yet but there is the clear implication that she is going to, and if Hayon wants to come around and make some proposition, she'll accept it.

"Incidentally, on September 15th Mrs. Sprengel said that Mrs. Miller told her that Dr. Miller had threatened suicide by driving his car off a cliff. The only other indication that I recall in the evidence of suicide talk—may have been more but one that sticks in my mind is when he was staying at the Habekosts during the separation and he was feeling real low and one time while having dinner some place he said, 'Might as well go out and end it all,' blow out his brains, something to that effect.

"Now, September 15th is after the reconciliation when Mrs. Miller is pretending to be—is lovey-dovey with her husband. It's right about that time shortly after that his folks come down and she's putting on the show of solidarity with Dr. Miller, let [*sic*] she's laying the groundwork for Dr. Miller's death, talking about suicide, and it is after that, on September 22nd, when she is [2063] supposed to be indicating how close she is with her husband, she's talking about this threat against Hayton, about still loving him. If he would have married her, she would have thrown away this letter.

"How about that separation? The divorce was filed July 8th. Of course, it had been in the lawyer's office some time before that. She had actually signed it a few days earlier than that. They were living apart. She is doing her best to make herself available to marry someone else, and she reconciled with him. Why? Not because she loved him. There is plenty of evidence all the way through here that any love was dead.

"Sprengel said she told him that she had lost any affection whatsoever for her husband. After the reconciliation Sprengel talked to her and she told Sprengel, in

explaining the reconciliation, twenty-five thousand a year is better than nothing.

"You see, during this separation it became apparent to her that it was going to take a little time to get Hayton back, and if she couldn't get Hayton, she was going to have to get somebody else to support her, and you can't divorce a $25,000-a-year income without something to substitute for it.

"Let's take a look at the insurance. The same day that her husband burned to death, Mrs. Miller was talking to Detective Paterson, and you heard the tape recording. [2064] There were two or three places in that tape recording which lasted about an hour where she giggled. One place where there is a rather humorous comment. Not a woman in a state of great shock, having lost her beloved husband.

"And he asked her about insurance, Paterson did. Yes, she said, she knew the names of the companies. There is a $50,000 policy, and she named the company. There is a $20,000 policy, and she named the company.

"Then she said, 'There is some more through the dental association.' She didn't know how much. I think she said small policies.

"You heard Harold Lance testify there were more policies than that. But let's take what she stated to Paterson the day her husband died that she knew about.

"She told Paterson there was a $50,000.00 policy with one company and $20,000.00 policy with another company, and Paterson said, 'Any of them double indemnity?' She says, 'Yes, the $20,000.00 policy definitely is,' and she thinks the $50,000.00 policy is.

"Now, when you are talking about why somebody killed somebody for financial gain, you are talking about

what is going on inside their thinking box, and she knew that the twenty thousand was double indemnity, and it was, as it turned out. She though the $50,000.00 policy was double indemnity. It wasn't, it turned out. But according to what she thought at that point, assuming an [2065] accidental death, there is fifty thousand with double indemnity, which is a hundred thousand, twenty thousand double, which is forty thousand. That's $140,000.00, assuming accidental death, plus some other smaller stuff which she doesn't know the details of.

"She can't divorce her husband because financially she can't afford it. Remember she had discussed with Mr. Hayton some time before the financial problems involved in divorce, and I think it doesn't take any great mathematical genius to know that a man whose income will not stretch to meet the expenses of a together household, it's going to be a whale of a lot more difficult if it's a separated house and you have to divide it up between two homes. I think that's common knowledge.

"Now, if Dr. Miller dies accidentally and she comes by at least a hundred and forty thousand dollars, this ought to tide her over. Maybe with Dr. Miller gone there will no longer be the gossip about Hayton going on with a married woman. He would be then legitimately able to go around with her.

"I think it's pretty clear that she didn't really conceive that anybody would not want to go around with her. Remember she told Sprengel that the real reason Hayton wouldn't see her was because he was afraid he'd weaken if he did see her. If she is a really free widow, perhaps he would come around, and $140,000.00

would give her a little [2066] time to work on him. If he didn't come around, there would be others. She has the example of this friend of hers, the dentist who was killed in an automobile accident and this friend got the insurance and married a doctor fairly soon thereafter.

"At any rate, when you consider that she knew the twenty thousand was double indemnity and she thought the fifty thousand was double, that's $70,000.00 extra in the event of accidental death, $70,000.00 that she would not get if Dr. Miller died in bed from an overdose of barbituates [sic].

"Well, the idea I'm sure did not spring full grown into her thinking. This is something that you think about and formulate and try to figure out how you can make it look for sure like an accident.

"She testified that she was familiar with Banyan Street; that she drove along Banyon Street many, many times. She told the CHP officer that she used it frequently and she was over it the day before.

"Remember Paterson in that tape that he took, he said, 'Well, that turn from Sapphire onto Banyon is kind of a sharp turn,' and she says, 'Well, maybe for you but not for me. I'm used to it.' She says, 'I go there all the time.' [2067]

they sat and drank hot chocolate and watched television; that was the first night, he said, that they had been out socially since his wife's death; but on cross-examination we found out that eight to ten nights before that, June 22nd, he was at Pitruzzello's with Lucille Miller, with Mr. and Mrs. Sprengel and with Dr. Grayson's daughter, and on June 22nd, that was the night that they went up then to the Caravan Inn.

Perhaps Mr. Hayton was not lying on direct examination. Perhaps he actually distinguishes between what is a social engagement and what is a sexual engagement.

"Let's examine that boat incident because it's really interesting. Mr. Turner wants you to think Lucille is a murderess, a vicious woman with a mean streak. That boat incident is a good example of where Mr. Turner is wrong. Every one of you have some time or other run into a jealous woman. You know what what they are like. Some time or other you have run into the scorn of a—the fury of woman that has been scorned. You know, hell hath no fury like that of a woman scorned, or words to that effect.

"So what do we have? We have Lucille Miller separated from her husband, about to divorce her husband, madly in love with Arthwell Hayton, and she must have gotten a trip some way because she follows him, she follows him down to the boat, the man that she's in love with.

"She sees him go out in that boat with another [2174]

"What effect did that boat incident have on her? Well, on page 13 of that tape to Sprengel she tells—she says, 'Well, his emotional entanglement with me is over as of when I went back with Cork, and in fact it was over as of the night of the boat.'

"Then the way she testified on the stand here again corroborates it. At page 1782 she was asked by Mr. Turner if she ever wanted to marry Arthwell, and she said yes, at one time she wanted to marry Arthwell.

"On page 1783 Mr. Turner asked her when she stopped wanting to marry Arthwell. She said she stopped wanting to marry him at the boat incident.

"You notice that she is talking about when she stopped wanting to marry him, not when she stopped feeling love in her heart for him. She had enough sense to know, [2176]

to you can you rely on Mr. Hayton? Is he a trustworthy and reliable witness? I want to ask you now how bad a girl was Lucille Miller for carrying on this affair with Arthwell. As you know it was not a pickup at a bar deal. It was an affair that took many years to culminate. The parties knew each other seven or eight years. The families were close. Lucille was Auntie Lucy to the Hayton children, and during this period of time she felt rejected, she said, by her husband.

"I think many women would call Arthwell Hayton handsome. I know that he is suave. He is smooth-talking. He is successful. He comes along at a time when Lucille wants attention. He gives it to her. An affair ultimately develops.

"I don't condone adultery, neither should you, but before we condemn the adultery, maybe we ought to do some soulsearching.

"Every week your own clergymen hear confessions of adultery. Every day or every week you own doctor hears confessions of adultery. Every week we as attorneys hear confessions of adultery and love affairs. Now, these things happen to the best of people. They start innocently.

"You take the average boss and secretary romance, how does it begin? With a coffee break, perhaps, then maybe luncheon, then it develops into the cocktails and before they know it an affair. If you asked that boss or [2181] that secretary when they began with a coffee break that this is going to end in an af-

fair, no, they'd say, they wouldn't believe it, but it does happen.

"So I don't condemn Arthwell Hayton for his part in this affair any more than I condemn Lucille Miller for her part, but I do condemn Arthwell for painting the distorted picture of it on the witness stand.

"How actually did Lucille feel about Arthwell at the time her husband died? We know that she said on the stand that at one time she wanted to marry Arthwell. She said that this desire ended at the boat incident, and straight from the shoulders she told you that she was in love with Arthwell Hayton up to the moment Cork was gone. That was not an easy confession to make, not to the whole world, not to the jury when her very life is at stake. You have got to admit that Lucille Miller is not a liar, not when she'll make an admission like that on the stand.

"Now, was she telling the truth about her desire to marry Arthwell ending at the boat incident and her love ending when Cork died?

"Well, if we look to the statements that she made before this trial, I think that you'll find there the corroboration for her testimony at the trial. On that tape with Mr. Sprengel when she tells about the boat incident, she said, 'I did that on purpose to save myself from letting my heart do something crazy.' [2182]

"Then about two weeks before her husband died she was talking to Mrs. Sprengel and she admitted to Mrs. Sprengel her love for Arthwell Hayton. But she also said, 'I would never marry him because he's no good.'

"Then Mr. Paterson, when he questioned her on tape on the night she was arrested, he asked her, 'How do

you feel about Mr. Hayton now?' And her answer was, 'Now? Bah.'

"So although Mr. Turner says that she wanted to kill her husband to marry Arthwell Hayton, there is absolutely no proof at this trial that she wanted to marry Arthwell after that boat incident. All the proof that has been submitted to you is to the contrary; her desire to marry Arthwell ended with the boat incident.

"Now, keep something else in mind, too. When Lucille was questioned by Mr. Paterson on the night she was arrested, she leveled with him concerning Mr. Hayton. She leveled with him concerning her feelings toward her own husband. She didn't try to conceal anything from him.

"Then we get to the point, well, how did she actually feel towards her husband when he died or right before he died. Well, there is evidence to the effect that she felt she was not in love with her husband.

"There is, of course, no evidence to the effect that she despised him or that she detested him or hated him. There is no evidence of any kind to that effect. [2183] The closest you come to it is at page 910 of the transcript where Mr. Sprengel claims that she once made a statement that she had lost whatever affection she had for her husband, but Mr. Sprengel admitted, too, that she said her husband was man of high principles.

"Now, Peggy Fisk, she is the fink that they put up in the jail to spy on Lucille, she claims that Lucille made the statement that Lucille did not love her husband, but Peggy also admits that Lucille said she respected her husband.

"She told Paterson on tape that she felt rejected for 14 out of the 15 years, but she did not condemn

her husband for that. In fact to Paterson she made excuses for her husband. She said, 'He's not a cruel man; his parents were German; he was not brought up affectionate or demonstrative; he thought it was sissified to be affectionate at all.'

"So she made excuses for her husband instead of condemning him. She must have mentioned to Mr. Paterson that she didn't feel as though she loved her husband, so Paterson asked her on tape, he said, 'Did Harold know you didn't love your husband?' Lucille said, 'Maybe I shouldn't have said that. Love is a word. I certainly had something going for Cork.'

"Now, she was right, love is a word. You know that as well as I do. We know that people confuse romance [2184] with love. They confuse sex with love. They confuse emotional feelings with love. That's why as adults we often try to discourage these teenage marriages. We say to the young couple, 'You don't know what love is.' But by the same token people as old as Lucille Miller and like Lucille Miller often confuse their attraction for a person as love when in fact it might be something else.

"What is love? You know what it is. The big thing about love, it's a willingness to sacrifice, a willingness to share troubles as well as joy. You love your wife. You love your children. You loved your parents. You can love a number of people at the same time. But the love you have for your wife, you don't get the thrill you got when you were dating her every time you see her. No, you don't get the thrill, but the sacrifice you are willing to make for her, the sacrifices you are willing to make for your children; if that's the true definition of love, then I submit to you that Lucille Miller

loved her husband Cork more than she loved Arthwell Hayton.

"Look at Lucille when she and Cork were separated. She used to let him come home each night to visit the children. She used to fix a special meal for him each night, a special diet.

"Mr. Turner says the reason she did that was to keep him strong so he could to go work the next day and earn money, but doesn't prove that at all. No proof [2185]

"Mr. Turner made quite a bit of mention about insurance money and how Lucille wanted that insurance money, but first of all, though, earlier in his argument he had mentioned the fact that Dr. Miller was netting $25,000.00 a year or more. That's pretty good money. You bet it's pretty good money. Lucille didn't need that insurance money.

"But let's take a look, though, at the insurance policies themselves that we put into evidence. There was a Continental policy, $20,000.00. That has a double indemnity feature to it. She knew about that policy and that double indemnity feature. That policy, and it's in [2238] evidence, was taken out on December 8th, 1954. That's ten years. That policy had been in existence a long, long time, and if she was looking for insurance money, she waited some ten years to be able to take advantage of that policy.

"The $50,000.00 Prudential policy, that wasn't taken out last week or last month or the month before. That was taken out on Febuary 1st, 1961, over three years ago. The other little policy in evidence was taken out on March 1st, 1961. So these are not new policies that they just recently got that she is suddenly going to try to take advantage of.

"How well did she know about these policies? Actually they had more policies but these are the only ones that she had any knowledge of. When she was questioned by Paterson about the policies, she told him, yes, there is a Connecticut policy, twenty thousand, that's double indemnity. She said there is a Prudential policy for fifty thousand. She said, 'I think it's double. I don't know.' Then she goes on to say that the husband and the accountant took care of those things. Although she had knowledge of them, she had only a general knowledge of them.

"Mr. Turner mentioned the fact that when she was questioned by Mr. Paterson, you can hear on the tape how she giggled; that she was not remorseful; that she was humorous. Okay. If you believe that, ask that that tape be replayed to you. Listen to the tape. You'll find out [2239]
ahead, maybe you would have know the ledge was there, maybe you would not.

"Mr. Hogancamp didn't know if was there that first hour and a half he spent there because I asked him at page 99, and he said he did not become aware of that drop until the next day when he returned to the fire scene. So it's not something that sticks right out. So although she used Banyan Street quite a bit, there is actually no evidence at all that she knew the ledge was there.

"Now I'm going to go into a little subject which I have labeled sort of dirty pool, and I think there has been some of it in this case.

"I told you that Lucille was arrested at 1:50 in the afternoon, then they begin to question her around 9:00 o'clock at night. She has already had over 36

hours of very little sleep. She is exhausted. She is running on nerve alone.

"Mr. Paterson questions her from 9:00 until 10:15, then he brings her downstairs in the interrogation room. There is no matron there at all. There is a hidden mike deal, two-way mirrors, two officers in the other room. They question her for another hour. Then they are not satisfied. They have got nothing incriminating at all against her. So they sneak up Peggy Fisk to go into the jail and Peggy Fisk spent five days in that jail.

"She went up there the following night, October [2243] the 9th. And as Peggy said, nobody could sleep in that jail that night because of all the noise going on. That's an indication of what I mean. You get thrown in that jail and it can be a real traumatic experience. Apparently heck was being raised that night among the prisoners.

"Peggy pretended she was in there on a narcotics violation. She said she was sent to listen, not to talk to Lucille, but merely to listen to what Lucille said. Of course, she wasn't getting anywhere there, wasn't accomplishing anything. Then the vice squad gave her a newspaper clipping and told her to take it up and show it to Lucille.

"And as she took that from under her gown and showed it to Lucille, she pointed out to Lucille, 'Look at what the press is doing to you. They are ruining you.'

"Then Peggy tries to undermine Lucille's confidence in me because she began to tell her about the experience that she had with an attorney that didn't do her any good and 'maybe you ought to think it over.' That's hitting way, way below the belt when they use

such tactics to try to undermine a defendant's confidence in her attorney.

"Who else has Lucille Miller got to turn to except me? And if she has no confidence in me, then where in the world is that poor girl then? They try to undermine her confidence in me, then try to create a confidence in [2244] Sheriff Bland, and Peggy Fisk tells Lucille that Sheriff Bland 'has just given me a floater out of town. I put all my trust in Sheriff Bland. Why don't you do the same?" So they are trying to take her away from me, who is here to protect her, over to Mr. Bland, who is there to prosecute her.

"Now, that's hitting below the belt.

"Then they told her, 'We heard a couple of deputy district attorneys talking and they said Hayton just came in and blew the lid off the case.'

"Well, I don't know how many others they have had up there from October the 8th right up until this trial listening and to report on anything she said, but his [sic] much we know, no matter how many they have, they haven't got a single thing that's incriminating against Lucille Miller. They have absolutely no admission, no confession of any kind, and they'll never have because Lucille Miller is innocent. [2245]

"He says the prosecution's case is based entirely on surmise and conjecture. That's not true.

"Is it surmise and conjecture that Mrs. Miller had been dissatisfied with her husband for a long time?

"No. Fact.

"It is surmise and conjecture that Mrs. Miller had been infatuated with Hayton and wanted to marry him?

"There is disagreement as to when this wanting to marry him stopped, but there is no question at all that she wanted to marry him.

"Is it surmise and conjecture that at the time [2265] she was arrested, she had not only his business card but two placecards from happier days?

"Is it surmise and conjecture that she told the girl up in the jail she still loved Hayton and did not love her husband?

"Is it surmise and conjecture that she went out and got a gasoline can full of gasoline?

"Is it surmise and conjecture that the gasoline can was in this Volkswagen on this night with the lid off and that this car burned up apparently with this terrific heat?

"Is it surmise and conjecture there is no evidence of any damage to this car such as would result from any sort of a collision or scraping or anything else?

"It is just stopped.

"Is it surmise and conjecture that the car was in low gear, not in high gear, where it would be if she had been driving down the road?

"Fact.

"Is it surmise and conjecture that the parking lights were on, not the headlights, as would have been if she had been driving down the road and this thing happened accidentally?

"That's a fact.

"Is it surmise and conjecture that Dr. Miller had a load of barbiturates in his system?

"No. It's a fact. [2266]

anything except tell the truth, and Mrs. Miller did not deny anything that he said.

"He ends up by saying, 'Before you condemn adultery, do a little soul-searching.'

"Just remember who brought up the subject of adultery. Not me. I'm not trying it. I don't care, and the only reason I keep going over this is because Mr. Foley did and I feel I have to answer it and I have to set the record straight.

"I'm concerned with did Mrs. Miller murder her husband, not whether or not she is an adultress.

"Mr. Foley said that she is so terribly honest because she said that she loved Mr. Hayton to the moment of the victim's death, therefore this indicates she is not a liar

"How is she going to get on the stand and say anything else when we have got the various people to whom she has indicated just shortly before this that she loved Hayton? And, of course, right after her husband's death she is arrested and is in custody, and she tells the girl upstairs that she still loves Hayton.

"A couple of weeks before her husband's death she is telling Mrs. Sprengel that she still loves Mr. Hayton.

"I don't think that indicates any great honesty. I don't think it is true as a matter of fact, that she stopped loving Hayton the moment her husband died. What [2271] was there about that to cause her to stop loving him.

"He says she leveled with Mr. Paterson about Hayton, didn't try to conceal anything.

"Go back and read that thing again. She didn't tell him much about Hayton. She says—she indicated she had been going with him and she didn't care for him any more, but she didn't say she had just stopped loving him twelve hours before or however long it had been.

"He says that the defendant admitted she didn't love her husband Dr. Miller but that there was no evidence she despised or hated him, so there is no evidence that he deserved being despised or hated. It is just that she didn't want him and she found it apparently financially inconvenient to divorce him.

"She says, 'I certainly had something going for Cork,' what she told Paterson, not what she said here.

"Then we have the discourse on love by Mr. Foley which I have mentioned.

"Analyze for yourself Mrs. Miller's actions throughout this whole thing and see where she fits in this description that Mr. Foley gives of love, the feeling of desire to make sacrifices for someone else.

"If Dr. Miller had any emotional problems, if he had headaches, if he had ulcers, this sort of thing, where do you think he got them?

"Mr. Foley says that Mrs. Miller doesn't keep any [2272]

There may be lots of reasons. There may be reasons that we haven't even thought of, don't know anything about. There are a lot of things that could have entered in. May have something to do with the pregnancy. I don't know. But the only things that appear on the surface to be motives are: (a) insurance. She has tried divorcing him and apparently this isn't working out financially and she told Sprengel she got back together with him because $25,000.00 a year was better than nothing. Money. Just a desire to be rid of this guy. Put up with him as long as she is going to. We know that she has been going with Hayton and wanting to marry him. Maybe she still does. She says she doesn't, but her actions indicate that she still does. Maybe she feels that the only reason Hayton is against

her is because his minister said to him, 'Knock it off; you are creating a lot of gossip going with a married woman.' Maybe after she becomes a widow and things quiet down a little bit, then they would be back together again.

"I think it appears all the way through here that she is convinced that nobody would of his own free will reject her. It is quite apparent she did not want to be married to Cork. She did or very recently had wanted to be married to Hayton.

"The reason she wanted to be married to Hayton still exists. If she could get the insurance which, [2274] according to what she told Paterson, would be over a hundred and forty thousand, this could tide her over until things could be patched up with Hayton, and if they couldn't be patched up, there are other people that make a lot of money.

"Her friend whose husband died in Pomona married a doctor.

"He says that with her husband making $25,000.00 a year, she didn't need the insurance.

"Just look at the evidence. For gosh sakes, $25,000.00 a year and she is having to borrow money from friends, forge her husband's name to applications for loans, notes. [2275]

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 154

LUCILLE MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I.

Respondent Has Misstated the Facts Relevant to the Violation of Petitioner's Constitutional Rights.

In its brief, the State of California devotes 45 pages to stating the facts that it deems "material to the questions presented. . . ."[1] It is not until page 41 that anything

[1] Rule 40, 2(e) Supreme Court of the United States, Revised Rules. The State recites every last detail of its case at trial, not once, but twice; the first time in its forty page statement of facts, and then again throughout its argument section. Nowhere does the State demonstrate the relevance of this "burdensome" and "immaterial" matter. See *Id.* at Rule 40, 5.

of relevance appears. And many of the statements from that point on are simply untrue; indeed, they are specifically contradicted by the transcript, the findings of the California District Court of Appeals, and, on some occasions, by other portions of the State's own brief.

The State asserts, for example, that the undercover agent, Peggy Fisk "was specifically instructed only to listen to Petitioner" (Respondent's brief at pages 41, 66). Yet Miss Fisk herself testified that she was instructed to start a conversation with Petitioner by deliberately lying about an incriminating conversation she allegedly overheard (R. 1107). Nor was that the only occasion on which Peggy Fisk, acting under specific instructions, commenced the discussion (see Petitioner's brief at pages 14-15). Indeed, the State—at another point in its brief—seems to concede that the conduct of the undercover agent, acting under instructions from the sheriff and police, went beyond "only" listening. On page 110, the State says:

> "The improper conduct of the undercover agent which took place after she had been placed in the jail all at the instigation of the sheriff has not been shown on this record to have been within the knowledge of the district attorney."

The State thus seems again to be ~~concerned~~ conceding—as it earlier did in its letter to the Clerk of this Court dated July 10, 1967—that the agent and the sheriff acted in an unconstitutional manner when Peggy, under specific instructions, began conversations with Petitioner by quoting what the State gingerly refers to as "fictitious conversations" (Respondent's brief at page 67). This concession would appear to be fatal to the State's position as stated in its own brief. The State argues that:

"'as the law stood at the time Peggy Fisk was placed in Petitioner's jail cell the sheriff had sufficient grounds for a good faith belief that he had a right to place an undercover agent in that jail cell for the purpose of overhearing Petitioner's statements *provided no attempt was made on the part of the undercover agent to elicit statements from Petitioner.*'[2] (Emphasis added.)

Yet, as the State conceded, its own proviso was not met: an attempt *was made* on the part of the undercover agent to elicit statements from Petitioner.

The State then seems to shift grounds and argue something like this: yes we concede that such an attempt was made; but the record does not clearly demonstrate that it succeeded. The State puts it this way:

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[2] In arriving at its formulation of "the law" as it "stood at the time" of the Fisk incident, the State relies on the most incredible legal metaphysics. It faults Petitioner's legal analysis because:

"... she has attempted to combine the necessary requisites for the applicability of the *Massiah* and *Escobedo* decisions. To get around the requirement of an accusatory pleading having been filed as to the *Massiah* rule Petitioner relies on *Escobedo*. To avoid the requirement in *Escobedo* that there be a process of interrogation and a denial of a requested opportunity to consult with a lawyer, Petitioner relies upon the indirect and surreptitious interrogation in *Massiah*. . . ." (Respondent's brief at page 61)

Without explaining why, the State insists that Petitioner "must claim under *Massiah* or *Escobedo*. She has no federal claim under combination of the two cases because of the January, 1965 date of trial," *Ibid.*, despite the fact that *both* these cases were decided prior to Petitioner's trial. Such a static view of where "the law stood" at any particular time—which does not even permit a combining of previously announced precedents—would encourage police and prosecutors to apply existing restrictions in the most grudging and artificial manner. This view of prospectivity makes little sense and does a real disservice to this Court's decision in *Johnson* v. *New Jersey*, 384 U.S. 719.

> "This particular conduct by the undercover agent was not proper, however, the record does not show any relationship between this improper conduct and the particular statements of Petitioner that were introduced into evidence."[3]

Common sense requires the conclusion, which any fair reading of the record strongly suggests, that the statements introduced at Petitioner's trial were the fruits of a process of carefully prepared and well executed statements designed to provoke responses. Even if the record were totally silent on this issue—which it is not—such silence would not inure to the benefit of the State. Surely, the "authorities have the burden of showing that their evidence is not tainted" by their concededly unconstitutional activity. *Cf. Murphy* v. *Waterfront Commission,* 378 U.S. 52, 79 at n. 18. The State has not even attempted to meet its burden here. Accordingly, this Court should assume what common sense requires and the record suggests: that the statements in-

[3] As support for this speculative assertion the State miscites the California District Court of Appeals as follows: "It was this conduct which the District Court of Appeal condemned but found that it had not injured. Petitioner. *People* v. *Miller, supra,* 245 Cal. App. 2d 112, 144. This is true because no product of this improper conduct was introduced into evidence." This creates the mistaken impression that the District Court of Appeal found that Peggy's "indefensible" conduct did not injure Petitioner *because* it did not cause her to talk. That Court made no such finding. It simply said that the statements which *were induced* from Petitioner at her trial did not injure her because they were not prejudicial. Indeed, at another point in its brief, the State seems to concede that the District Court of Appeal found that Peggy's Petitioner's statements resulted from the State's unconstitutional activities. In describing the case at bar, the State says the following on pages 114-115:

> "The District Court of Appeal held that the jail cell statements of Petitioner were *unconstitutionally obtained* under *Dorado.*" (Emphasis added).

troduced against Petitioner at her trial were the fruits of the concededly unlawful activity of the sheriff and the undercover agent.[4]

II.

Respondent Is Wrong in Suggesting That Arguments in Favor of "Prospective Overruling" Are Applicable as "Harmless Error".

Respondent argues that the "same considerations" that moved this Court to apply certain constitutional rules prospectively only, "should persuade this Court to hold that a harmless error is applicable" to the introduction of unconstitutionally obtained admissions (Respondent's brief at page 101). It suggests that the arguments which support "prospective application of . . . constitutional criminal rules [are] equally sound in support of the application of harmless error rules to constitutional error . . ." (Respondent's brief at page 105). Whatever surface appeal this analogy may have quickly evaporates upon analysis. The factors relevant in deciding whether a given rule should

[4] The State also says that the record does not show that any of the statements were made after October 12, 1964 (Respondent's brief at page 54)—the day on which the formal complaint was filed and the arraignment held. But nor does it show that the statements suddenly stopped on that day, three days before Miss Fisk left Petitioner's cell. Indeed, the record strongly suggests that the statements continued at least until October 14, 1964 since Peggy Fisk "prepared her report as to her conversations with Petitioner on October 12, 1964 *and partly on October 14, 1964.*" (Respondent's supplemental opposing brief at page 3). In any event, the burden should be on the State to establish that the statements suddenly stopped, and the burden cannot be satisfied by what the record does not show. Moreover, even if the statements were completed before formal complaint and arraignment—which Petitioner by no means concedes—it should make no difference, since Petitioner had been arrested, booked and imprisoned prior to any of the statements.

be applied retrospectively are quite different from those relevant in deciding whether violation of the rule may be deemed harmless. In deciding on retrospectivity, the critical question is whether the purposes of the rule "would be advanced by making [it] retrospective." *Linkletter* v. *Walker*, 381 U.S. 618 (1965). Thus, rules which have as their primary purpose the deterrence of unlawful police conduct are applied prospectively, since misconduct which had "already occurred" prior to the announcement of the rule "will not be corrected by making the rule retrospective." *Id.* at 637. In deciding whether a violation of a given rule may be deemed *harmless*, on the other hand, the critical question is completely different: it is whether violations of the rule can be deemed so unimportant and insignificant that one can be confident that it did not affect the outcome of the trial. In answering this question, the purposes of the violated rule are irrelevant; only the impact of its violation on the outcome of the trial is important. This distinction may be illustrated by reference to confessions obtained in violation of the *Escobedo* and *Miranda* decisions. The "prime purpose of [the *Escobedo* and *Miranda*] rulings is to guarantee full effectuations of the privilege against the possibility of unreliable statements." *Johnson* v. *New Jersey*, 384 U.S. 719, at pages 729-730 (1966). Accordingly, these rulings will not be applied retrospectively. Yet the State concedes that the introduction of any unconstitutionally obtained confessions must be deemed prejudicial (Respondent's brief at pages 82-83). Nor does it matter whether the confession was obtained in violation of the case law on "coerced confessions" or the prophylactic rules of *Escobedo* and *Miranda*,[5] although that distinction is

[5] "The improper introduction of a confession which has been obtained in violation of the constitutional right to counsel trans-

determinative in deciding retrospectivity. *Johnson* v. *New Jersey*, 384 U.S. 719, at page 730. It seems clear therefore, that the considerations relevant to deciding whether a rule should be applied retrospectively are simply inapposite in deciding whether violation of that rule may be deemed harmless.

III.

Respondent Is Wrong in Stating That Petitioner Waived Her Federal Constitutional Claims.

The State renews its argument that Petitioner waived her federal constitutional claims by failing to renew her objection to Miss Fisk's testimony in the presence of the jury. Petitioner has responded to this argument at length in her petition for certiorari (at pages 7-13) and in her reply brief on certiorari (at pages 3-5). The Court is respectfully referred to these discussions. It is only necessary here to emphasize two points: (1) Petitioner's trial counsel did specifically object, on federal constitutional grounds, to the introduction of Miss Fisk's testimony (R. 1009); and (2) he specifically objected to the trial judge's ruling that the objection must be renewed in the presence of the jury (R. 1015).[6] If it were true, as the State claims, that Peti-

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gresses the protection of due process no less than the illegal introduction of a confession which had been coerced and Courts cannot inquire into the prejudicial nature of the introduction of an illegally obtained confession for the reasons stated in *People* v. *Parham*, 60 Cal. 2d 378, 385 (1963)." (Respondent's brief at pages 83-84).

[6] The completely justifiable reason for trial counsel's unwillingness to renew the objections in the presence of the jury, is fully explained in the Petition for Certiorari at page 12, to which the Court is referred.

tioner's counsel wanted Peggy Fisk's testimony to be included rather than excluded, then why did he specifically object to its introduction?

IV.

Respondent Is Wrong in Arguing That the Introduction of Peggy Fisk's Testimony Was Not Prejudicial.

Respondent spends many pages attempting to show that the introduction of Peggy Fisk's testimony was not prejudicial. Any fair reading of the record belies such a conclusion. Peggy's brief, but dramatic, testimony contained: (1) a specific and critical contradiction of Petitioner's testimony; (2) an admission calculated to enrage the jury against Petitioner; (3) an indication of feelings by Petitioner more consistent with guilt than innocence; and (4) a clear statement of possible motive for the alleged crime.[7]

The contradiction was that in her testimony Petitioner specifically denied loving Mr. Hayton after her husband's death (Appendix pages 102-103); yet Peggy Fisk testified that Petitioner admitted that she "still loves him" at the time of jail cell "conversation" (Appendix at pages 56-57). Any reasonable juror would be enraged by the spectre of a woman continuing to love another man after her husband's accidental death. Moreover, such a feeling would be far more likely to exist if Petitioner had murdered her husband than if he had died accidentally. Finally, and most importantly, Peggy Fisk's testimony must have been understood, in the context in which it was given, to suggest not

[7] Even the State concedes this. It describes the testimony as "a statement of the fact that she had a motive to murder her husband. . . ." (Respondent's brief at page 98).

only that Petitioner continued to *love* Mr. Hayton up to and after her husband's death; but that she continued to *want him to come to her.* And this, as the State concedes, was the critical and disputed issue at the trial (Respondent's brief at page 98). This is surely the way the prosecutor told the jury to understand it. In his closing argument he said:

> "She testified that she loved Hayton; that she wanted to marry him. She testified that her love for him died the same time her husband died. I'm not sure what that would have to do with it. At any rate, that's her testimony. But that's not what she told the girl up in jail. She told the girl up in the jail that she still loved Hayton, *felt that he would come to her.*" (Emphasis added.) (Appendix at page 105)

No court could be satisfied, in the context of this "close" case,[8] that there was no "reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut,* 375 U.S. at pages 86-87. Accordingly, reversal is required.[9]

Respectfully submitted,[10]

F. Lee Bailey
Counsel for Petitioner

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[8] See *Chapman* v. *California,* 386 U.S. 18 at page 23 (1967). In this case, the jury deliberated for more than three days, and the Court of Appeal stated that this case of "circumstantial evidence . . . was bitterly contested" and that "much of the evidence was conflicting." 53 Cal. Rptr. at page 727.

[9] If this Court chooses not to review the evidence in this case, it should—as Petitioner argued in her brief (at page 33)—"vacate and remand for reconsideration in light of *Chapman* v. *California,*

(*footnote 10 on following page*)

supra, which was decided after the last action of the California courts in this case, and which conclusively establishes that the District Court of Appeals in deciding that the introduction of Peggy Fisk's testimony was harmless error, was applying an erroneous constitutional standard." In that brief, Petitioner called the Court's attention to a number of cases which were reversed by the California courts after this Court remanded them for reconsideration in light of *Chapman* v. *California*, 386 U.S. 18 (1967). Since the filing of the brief, Petitioner has learned of other such cases: *People* v. *James Rowald Ricks*, 2nd Crim. 8216 (Second Appellate District); and *People* v. *Kenneth Reynolds Wheaton*, 2d Crim. 9915 (Second Appellate District). Accordingly, even if this Court rejects petitioner's argument against extending the harmless error rule to inculpatory admissions, it should not affirm petitioner's conviction without affording the California courts an opportunity to decide whether the error in this case was prejudicial under *Chapman* v. *California*.

[10] In her petition for certiorari, petitioner asked this Court to review five questions. Among them was the following:

> IV. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER IT IS UNCONSTITUTIONAL FOR A PROSECUTOR, WHO DOES NOT INTEND TO SEEK THE DEATH PENALTY FROM THE JURY, TO DISQUALIFY FOR CAUSE THOSE JURORS WHO HAVE CONSCIENTIOUS SCRUPLES AGAINST IMPOSING THE DEATH PENALTY.

This Court limited its grant of certiorari, however, to the first two questions, and petitioner has, in her brief, addressed herself only to them. This Court has now granted certiorari in two cases raising the issue of the death qualified jury. *Witherspoon* v. *Illinois*, #1015; *Bumper* v. *North Carolina*, #1016. Petitioner respectfully reminds the Court that this issue was properly raised and preserved in her case as well. If this Court sees fit, therefore, it may, if it holds the death qualified jury unconstitutional, reverse petitioner's conviction on that ground. Counsel is, of course, prepared to brief and/or argue this issue if invited to do so by the Court.

SUPREME COURT OF THE UNITED STATES

No. 154.—October Term, 1967.

Lucille Miller, Petitioner, *v.* State of California.	On Writ of Certiorari to the District Court of Appeal of California, Fourth Appellate District.

[June 17, 1968.]

Per Curiam.

The writ is dismissed as improvidently granted.

SUPREME COURT OF THE UNITED STATES

No. 154.—October Term, 1967.

Lucille Miller, Petitioner, v. State of California. | On Writ of Certiorari to the District Court of Appeal of California, Fourth Appellate District.

[June 17, 1968.]

Mr. Justice Marshall, with whom The Chief Justice, Mr. Justice Douglas, and Mr. Justice Brennan join, dissenting.

The Court may leave this judgment standing only upon one or more of the following grounds: that there was no constitutional error in petitioner's trial; that whether or not there was error, objection to it was waived; or that the error was harmless. None of those grounds are persuasive to me, and I would reverse.

The facts of the case are as follows. A short time after midnight on October 8, 1964, petitioner's husband was killed in the conflagration of the automobile in which he and petitioner had been riding. Later that day, at about 1:30 p. m., petitioner was arrested for murder, and was taken to a county jail, where she was booked on that charge and placed in a cell. She was met at the jail by a lawyer, a family friend who had been called by petitioner shortly after the fire. The night of her arrest petitioner spoke with a police officer for several hours at the jail, answering questions and reciting her version of what she claimed to have been an accidental fire.

In an attempt to prevent questioning of his client, petitioner's counsel set up, with his associates, a 24-hour-a-day watch of her cell. Thereafter, at about 11 p. m. on October 9, Peggy Fisk, an undercover agent in the employ of the county sheriff's office, was falsely booked into the jail on a fictitious narcotics charge and placed in petitioner's cell. Two other prisoners who had shared

the cell were later removed. Fisk did not advise petitioner that she was an agent of the sheriff placed in the cell to report on anything petitioner might say. She remained alone with petitioner until October 15, giving oral reports as to their conversations from time to time to the sheriff's office; a written report was prepared on October 12 and partly on October 14.

On October 13, a complaint was filed formally charging petitioner with murder; petitioner was arraigned that day on the complaint.[1] An indictment was returned on October 20, and the complaint was then dismissed.

It was the State's theory at trial that petitioner did not love her husband; that she drugged him and then set the automobile on fire; and that she killed him in order to be free to marry one Arthwell Hayton and to collect some $100,000 in insurance proceeds. The defense theory was that the fire was of accidental, rather than incendiary, origin. The defense contended that although petitioner was in love with Hayton until her husband's death the affair between them had terminated several months earlier, petitioner had given up any thought of marrying Hayton, and had been reconciled with her husband; and that she would not be motivated to kill her husband for the insurance since he earned some $30,000 a year in his dental practice.

Fisk was called as a prosecution witness at trial and testified that petitioner told her in the cell after her arrest for murder that "she did not love her husband but she respected him"; that "she had always loved Mr. Hayton and still loves him"; that "she would receive over a hundred thousand dollars in insurance because of the accidental death"; and that "as soon as this mess

[1] The judge on the same day issued an order prohibiting officials from questioning petitioner unless her attorney was present, and ordered her attorneys to cease sitting outside her cell. Apparently, the police did not inform the judge of Fisk's continued presence.

was over, that she planned to take [her children] . . . away to Europe with the insurance money."

The district attorney relied upon and emphasized Fisk's testimony in his argument to the jury. See pp. 13–14, *infra*. After deliberating for more than three days, the jury returned a verdict that petitioner was guilty of murder in the first degree. She was later sentenced to life imprisonment.

I.

Although the issue is not free from difficulty, it seems to me the record clearly reveals petitioner adequately raised and preserved her federal constitutional objection to Fisk's testimony. That issue arises in the following context.

Toward the close of its case in chief, the prosecution called Fisk as a witness. Petitioner's trial counsel immediately objected, before Fisk was sworn, to her testimony at that time, on the ground that he had not been given her address prior to her testifying as he had been promised. There then occurred an extended conference in the judge's chambers.

In chambers, petitioner's counsel made two objections to Fisk's testimony. He first discussed the objection raised in the presence of the jury that he had not been given the witness' address as he had been promised, so that he might interview her. He then presented extensively the constitutional objection to any testimony at all from Fisk, discussing the circumstances giving rise to the contention and citing the relevant cases.[2] The district attorney first explained why he had been unable to

[2] Counsel cited by name and discussed, as did the district attorney, *Massiah* v. *United States*, 377 U. S. 201 (1964), and *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361 (1965). The latter decision, grounded on the Federal Constitution, encompasses a claim based on *Escobedo* v. *Illinois*, 378 U. S. 478 (1964).

provide counsel with Fisk's address and acknowledged that he had forgotten the request, which was apparently based on the fact that defense counsel had been shown, a month or so earlier, a report of the sheriff concerning the witness in which she had been identified as "Jackie Doe." He attempted to distinguish the cases cited by petitioner's counsel, and elaborated somewhat on Fisk's activities.[3]

As to the first ground of objection, the trial judge said "in view of the circumstances related that Mr. Foley [defense counsel] was promised an opportunity to talk to this witness," Fisk should be withdrawn at that time. The district attorney agreed to withdraw her. The trial judge then turned to the constitutional ground of objection. It had been clearly disclosed at the conference that Fisk spent almost a week in petitioner's cell, without disclosing her identity, and would testify concerning statements made to her by petitioner. The district attorney said he would call her as a witness the next day and stated to the judge, as to petitioner's constitutional objection: "You would have to wait and listen to the voir dire on the stand and see." The following colloquy, concluding the in-chambers conference, ensued:

> "The COURT: . . . [Y]ou will have the opportunity to talk to her but on the other objection, we would have to have her sworn and at least testify to the preliminary question anyway, and have an objection made at the proper time.
>
> "Mr. FOLEY: You know that isn't right, your Honor.

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[3] The district attorney represented that Fisk, although being with petitioner "for about a week," did not interrogate petitioner or in any way seek to elicit information from her. Although that representation was undoubtedly made in good faith at the time, it is conceded to be incorrect. See p. 11, *infra*.

"The COURT: Unless you want me to look at this [sheriff's] report and see what she knows. Does this report indicate?

"Mr. TURNER [district attorney]: There has to be a foundation laid, an objection made. There is no way to—

"The COURT: I think there would have to be. I don't see how that could be done *in the absence of the jury.*" (Emphasis added.)

The following day Fisk was called as a witness. The district attorney asked some preliminary questions. Fisk was identified as having been employed the previous October by the county sheriff as an undercover agent, and it was elicited that in the course of that employment she was assigned the task of pretending to be a prisoner in jail with petitioner, where she became acquainted and talked with her. When the district attorney asked Fisk if petitioner had discussed her "domestic problems with her husband," counsel for petitioner asked if he might "ask a question on voir dire." He elicited that Fisk had not identified herself as a police agent to petitioner, and had not advised petitioner she could have an attorney present when they talked. Direct examination was then resumed by the district attorney. Fisk then testified concerning petitioner's statements to her, see pp. 2–3, *supra.*

On cross-examination, petitioner's counsel elicited answers concerning Fisk's being placed in petitioner's cell, reporting to the sheriff, and activities in the cell (see p. 11, *infra*). He also elicited that petitioner had told Fisk the fire was accidental, and, in short, a story concerning her husband's death consistent with that which petitioner had related to the police at the scene and in questioning at the jail, and consistent with petitioner's claim of innocence.

In these circumstances respondent contends that it is "obvious" that petitioner's trial counsel, following his interview with Fisk, made a tactical judgment that her testimony would be helpful, and therefore that the federal claim is not available to petitioner here because it was waived. I find that view unacceptable.

The District Court of Appeal clearly agreed that petitioner's federal contention based on our decisions in *Massiah* and *Escobedo* was valid. 245 Cal. App. 2d 112, 144. The court stated it did not reverse the conviction only because it viewed Fisk's testimony as nonprejudicial. *Ibid.*. However, it went on to say that petitioner waived the point by failing to object when Fisk was called the day following the in-chambers conference, or, to put it another way, that "it is reasonable to assume that defense counsel was willing to have Peggy [Fisk] testify" in the circumstances. 245 Cal. App. 2d, at 143.[4] I think it significant to note that the Supreme Court of California specifically disapproved the language of the District Court of Appeal in this case with respect to waiver of objections to admission of evidence obtained in violation of *"Escobedo-Dorado"* by a mere failure to object, see *People* v. *Doherty*, 67 Cal. 2d —, —, 429 P. 2d 177, 180 (1967), and in the same decision cast considerable doubt on the approach of the District Court of Appeal in this case towards presuming or assuming that the failure to object was a considered trial stratagem.[5]

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[4] One factor recited by the court as leading it to conclude that petitioner's counsel desired Peggy Fisk's testimony was that he "received a copy of Peggy's report to her superiors concerning her talks with defendant," and, apparently, was in a position to balance its advantages and disadvantages. 245 Cal. App. 2d, at 143. The record does not reveal that sheriff's report, but it does show that counsel had seen it prior to objecting strenuously at the in-chambers conference to Fisk's testifying.

[5] In the *Doherty* case, the California Supreme Court said, in a situation where counsel might develop facts upon which an objection could be based but did not object (in relation to that court's *Dorado*

In any event, this Court has long held that a waiver of a federal constitutional right is not lightly to be presumed. See, *e. g.*, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). In this case counsel clearly apprised the trial court of the basis of his objection, and indeed he cited the specific decisions that clearly supported the claim. Surely there was no bypassing of the state courts on the issue.

Concerning the failure to renew the objection, I note that the trial judge appears clearly to have required petitioner to raise the issue anew in front of the jury and after preliminary questions had been asked of Fisk. On this record those preliminary questions clearly identified her as having engaged in conversations with petitioner as an undercover agent in the jail pretending to be a fellow prisoner. As petitioner's trial counsel said in a motion for a new trial: "The defendant was then placed in the unfortunate position of being forced to object in front of the jury. If the objection were sustained, the jury might well . . . infer that through a technicality the defendant had managed to keep out of evidence a full confession."

Thus the most that can be said on this record is that trial counsel—having previously raised the objection—preferred to have Fisk's testimony admitted rather than objecting to it in the presence of the jury after Fisk had been identified. Cf. *Jackson* v. *Denno*, 378 U. S. 368 (1964); *People* v. *Schader*, 62 Cal. 2d 716, 727–728, 401 P. 2d 665, 672 (1965). Placing a defendant in that kind of a dilemma with respect to renewing a federal constitutional objections serves no valid purpose. *Douglas* v. *Alabama*, 380 U. S. 415, 422 (1965). And while respondent indicates here that California law permits a

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decision), not that it would assume waiver of the point, but rather that "[i]f the People should sustain the burden of establishing the fact of such tactics, we would treat defendant's stratagem as a waiver of the objection." 67 Cal. 2d, at —, n. 4, 429 P. 2d, at 180, n. 4.

defendant to object to the admission of evidence and establish a basis for the objection outside the presence of the jury (citing *Schader, supra*), that was neither the import of the trial judge's ruling in this case nor the view of the district attorney at this trial (see pp. 4–5, *supra*).

Since the record reveals the trial court and the prosecution were clearly apprised of the constitutional claim, since the state court at least alternatively passed upon validity of that claim, and since it cannot be said on the record that the failure to renew the objection was anything more than a decision reflecting the trial judge's ruling that the objection be voiced before the jury, I should think it perfectly clear that the issue was adequately preserved.[6]

II.

Notwithstanding that respondent's own courts viewed Fisk's placement and activities in petitioner's cell as unconstitutional, respondent here attempts to defend the sheriff's action on two grounds, both of which are patently without substance.

Respondent contends that petitioner's constitutional rights were not violated, because Fisk was placed in the cell prior to any formal charge being filed against petitioner. To be sure, it is emphasized in *Massiah* v. *United States*, 379 U. S. 201, 204–206 (1964), that the defendant there had been indicted and that an indictment marks a point at which the formal adversary process begins. Thus, the Court held that statements obtained on behalf of the prosecution by a co-conspirator of the defendant during conversations in the former's automobile, violated the defendant's Sixth Amendment

[6] Cf. *Fay* v. *Noia*, 372 U. S. 391, 438–440 (1963). Compare *Henry* v. *Mississippi*, 379 U. S. 443 (1965).

right to counsel[7] since he had been indicted and was already represented by counsel. At the same Term, the failure to honor the right to counsel was recognized at an earlier stage in respect to interrogations, namely, when, among other things, "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect . . . ." *Escobedo* v. *Illinois*, 378 U. S. 478, 490 (1964). That language applies here. Petitioner had been arrested and booked for murder. Clearly, given the circumstances of the fire, if a crime had been committed, petitioner had done it. In practical effect the criminal proceedings had begun, for it is clear from the arrest, from petitioner's initial questioning, and from the decision to use Fisk that the sheriff's office had ceased merely a general inquiry into the cause of the fire.[8]

Indeed, in one respect at least, this is a clearer case than *Massiah*: unlike the defendant there, who had been released on bail, petitioner was in custody without bail, with a consequent lack of freedom to choose her companions. And petitioner, like the defendants in *Massiah* and *Escobeda*, was represented by counsel at all times. Moreover, a formal complaint charging petitioner with murder was filed on October 13, and Fisk remained in petitioner's cell, eliciting information or conversing with petitioner until October 15.[9]

Both state courts, see, *e. g.*, *People* v. *Flores*, 236 Cal. App. 2d 807, 46 Cal. Rptr. 412 (1965), cert. denied, 384 U. S. 1010 (1966) (jail cell plant); *People* v. *Ludlum*, 236 Cal. App. 2d 813, 46 Cal. Rptr. 375 (1965), and

[7] At the same Term, *Massiah* was applied to vacate a state judgment affirming a conviction. *McLeod* v. *Ohio*, 378 U. S. 582 (1964). See also *McLeod* v. *Ohio*, 381 U. S. 356 (1965).

[8] Compare *Hoffa* v. *United States*, 385 U. S. 293, 309–310 (1966).

[9] See n. 12, *infra*.

lower federal courts, see, *e. g.*, *Clifton* v. *United States*, 341 F. 2d 649 (C. A. 5th Cir. 1965), have held that the right to counsel as interpreted in *Massiah* and *Escobedo* bars the admission of statements obtained at some pre-indictment point, at least when the accusatory stage has been reached and the police have clearly focused upon the subject.[10] However that stage be defined, it was clearly reached here.

Respondent also contends that petitioner's constitutional rights were not violated, because Fisk engaged in no "process of interrogations," *Escobedo* v. *Illinois*, 378 U. S., at 491, designed to obtain a confession from petitioner, or that statements from her had not been "deliberately elicited," *Massiah* v. *United States*, 377 U. S., at 206. In the State's view, so long as Fisk acted simply as a listening post, she could testify as to any statements made to her by petitioner. That view was, however, rejected in *Massiah* itself. The Government in that case pointed to the fact that the record did not reveal that its agent had induced the defendant by persuasion (there based on friendship) to discuss his activities, and urged that "providing a defendant an opportunity to talk"[11] did not violate his right to counsel. See also *Beatty* v. *United States*, 389 U. S. 45 (1967), reversing 377 F. 2d 181 (C. A. 5th Cir.).

At all events, Fisk was not put in the cell to discuss the weather, to console petitioner, or merely to provide her with companionship. Her presence itself was an inducement to speak, and an inducement by a police agent. While petitioner's statements to her were not obtained by coercive means, they certainly were not

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[10] Cf. *People* v. *Robinson*, 16 App. Div. 2d 184, 224 N. Y. S. 2d 705 (4th Dept. 1962) (jail cell plant). See also Note, 79 Harv. L. Rev. 935, 1006 (1966).

[11] Brief for the United States, *Massiah* v. *United States*, No. 199, October Term, 1963, p. 30.

given, in light of the deception, through a knowing and intelligent waiver of petitioner's rights.

Furthermore, it is clear on this record that Fisk was planted in petitioner's cell in order to subvert her right to counsel, with the express purpose of attempting to obtain evidence out of her mouth. On one occasion, Fisk was given a newspaper clipping concerning the case and was told to show it to petitioner, which she did with some accompanying statement, such as the press is "ruining you." On another occasion, pursuant to instructions, Fisk told petitioner of a conversation that she had supposedly overheard in a hall between four men whom she thought were from the district attorney's office, in which one of the men, as the ruse went, said: "Getting back to the Miller case, Arthwell Hayton came in and blew the top off the case." Fisk also told petitioner "I put all my trust in Mr. Bland [the sheriff] and maybe it would do some good for you if you tried the same." Finally, Fisk said that she had at one time been represented by an attorney who "did not do me much good" and indicated that perhaps petitioner should suspect hers.[12]

Such deliberate police deception and subversion of a defendant's rights should not be condoned. The District Court of Appeal said in this case:

> "It is almost incredible that in these days of enlightened treatment by prosecution authorities of

[12] Respondent also argues that petitioner did not show that any of her statements as related by Fisk occurred prior to the filing of a formal charge on October 13, or were specifically prompted by the four incidents of deliberate inducements to speak related in the text above. Of course petitioner has no such burden in the circumstances of this case. Besides, petitioner's counsel asked Fisk, for example, "which day was it that she [petitioner] mentioned insurance money to you, 9th, 10th, 11th, 12th, 13th or 14th?" Fisk was unable to answer. Moreover, assuming all the statements were made on the first day of Fisk's deceptive presence in the cell, I would reach the same result.

persons charged with crime, the Peggy Fisk incident could have occurred. . . .

. . . . . .

"The trick attempted by the authorities in which they apparently hoped to obtain incriminating statements from defendant and to get her to throw herself on the alleged mercy of the sheriff and to suspect her own attorney was completely indefensible . . . ." (245 Cal. App. 2d, at 141, 144.)[13]

I agree, and I would not leave standing a judgment reflecting such an egregious violation of *Massiah* and *Escobedo*.[14]

III.

Having concluded that petitioner properly preserved her federal constitutional objection to the admission of Fisk's testimony, and that its admission did indeed violate her constitutional rights, I turn to respondent's contention that the error was "harmless beyond a reasonable doubt," *Chapman* v. *California*, 386 U. S. 18, 24 (1967). *Chapman* was decided after the decision of the California District Court of Appeal now on review here, and normally a remand would be in order so that the state court might reconsider, in light of that case, its conclusion that the error was harmless. However, since a majority of the Court refuses to decide this case at all, I wish to point out why I cannot regard the error as harmless.

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[13] In addition to the other cited cases (see pp. 9–10, *supra*) in which the admission of testimony by jail cell undercover agents was held to be unconstitutional, see *People* v. *Arguello*, 63 Cal. 2d 566, 407 P. 2d 661 (1965).

[14] Petitioner's trial, which began on January 11, 1965, was prior to the effective date of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and therefore that decision is not applicable. See *Johnson* v. *New Jersey*, 384 U. S. 719, 734 (1966).

I have already indicated generally the theories of the prosecution and defense as to Dr. Miller's death (see pp. 2–3, *supra*). The evidence against petitioner was circumstantial.[15] So saying, I do not imply it was necessarily in any sense weak; that fact does, however, help to indicate why the issue of motive was particularly crucial, and one which was central to the trial. Fisk's testimony definitely supported the State's case on that issue. Petitioner testified that she loved Hayton "until the minute that Cork [Dr. Miller] was gone," but that she had given up any idea of marrying Hayton as of the time of an incident that occurred approximately three months prior to her husband's death. As to that testimony, the district attorney argued to the jury:

> "But that's not what she told the girl [Fisk] up in jail. She told the girl up in jail that she still loved Hayton, felt that he would come to her."

On rebuttal argument, the district attorney again emphasized Fisk's testimony:

> "He [defense counsel] says the prosecution's case is based entirely on surmise and conjecture. That's not true.
>
> . . . . . .
>
> "Is it surmise and conjecture that Mrs. Miller had been infatuated with Hayton and wanted to marry him?
>
> "There is disagreement as to when this wanting to marry him stopped, but there is no question at all that she wanted to marry him.
>
> . . . . . .
>
> "Is it surmise and conjecture that she told the

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[15] See *Fontaine* v. *California*, *ante*, at —; compare *Anderson* v. *Nelson*, *ante*, at —.

girl up in jail she still loved Hayton and did not love her husband?

. . . . . .

"And, of course, right after her husband's death she is arrested and is in custody, and she tells the girl upstairs that she still loves Hayton."

To be sure, for almost each point upon which Fisk's testimony was emphasized there was other supporting evidence. But this Court has always viewed evidence out of a defendant's own mouth, obtained after the events, as particularly weighty with the jury. See *Bram* v. *United States*, 168 U. S. 532 (1897); *Jackson* v. *Denno*, 378 U. S. 368 (1964). And, as the quotations above indicate, that was plainly the view of the district attorney in this case. Certainly Fisk's testimony, if believed, made the prosecution's case much more credible, and undermined petitioner's defense.

Moreover, the jury deliberated three days before reaching a verdict. It may have spent that time assessing the expert testimony in regard to the causes of fires in automobiles, weighing the prosecution's experts' testimony that this fire was of incendiary origin against the testimony of an expert for the defense, who said the fire might well have been accidental. It may have found all that time necessary to resolve the question of guilt or innocence. Or, since it was charged on both first- and second-degree murder, it might have spent that time weighing not guilt and innocence but degree of guilt, even though only the former would have been consistent with the prosecution's theory. Fisk's testimony may have been particularly important with respect to the jury's resolution of that matter. While of course one cannot know definitely what occupied the jury's time during the three days it deliberated, I am convinced it cannot be said

"beyond a reasonable doubt," *Chapman* v. *California, supra,* that there is no "reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut,* 375 U. S. 85, 86–87 (1963). I would therefore reverse petitioner's conviction.